Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

Dean Borst, Harry S. Back, *et al.* and the Classes
They Have Been Certified To Represent,
Petitioners,
v.
Chevron Corporation, Chevron U.S.A., Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether plan participants were entitled to a jury trial on their contractual claim for surplus assets brought under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

2. Whether Chevron was prohibited from reverting the surplus assets for its own use by the plain-language summary plan descriptions distributed to plan participants pursuant to ERISA § 102(a)(1), 28 U.S.C. § 1022(a)(1), which reasonably disclosed that any surplus under the plan would not at any time revert to the employer.

3. Whether the partial termination of their pension plan entitled petitioners to an allocation of the surplus assets.

LIST OF PARTIES

Petitioners:

Harry S. Back, Rosalind Barbaree, Dean Borst, William M. DeBoer, Edward Develin, Melvin Duncan, L.R. Elkins, Charles J. Faigle, Jr., Randy Farber, John Fonda, Alan Gopen, Michael Hensel, Harry H. Holcombe, Elmer S. Holden, S.R. Keator, Jim W. Keen, Gene Kiesling, Joseph H. Knoll, Mark Linsey, Henry A. Little, John D. Loughran, Pat L. Love, Alice Moody, James Polhamus, Helena Fay Schneider, Carol L. Sims, Relis Stelly, Terry Welf, James H. White, Rick Wynn, John L. Zidian, and the classes they have been certified to represent.

Respondents:

Chevron Corporation, Chevron U.S.A., Inc., Gulf Oil Corporation, Chevron Corporation Retirement Plan, Pension Plan of Gulf Oil Corporation, Benefits Committee of the Pension Plan of Gulf Oil Corporation and each of its members, and Pension Committee of the Pension Plan of Gulf Oil Corporation and each of its members.

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Dean Borst, Harry S. Back, *et al.*, and the classes they have been certified to represent, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit is reported at 36 F.3d 1308 (5th Cir. 1994). App., 1-36. The opinion and order of the United States District Court for the Southern District of Texas is reported at 764 F. Supp. 1149 (S.D. Tex. 1991). App., 39-183. The order of the district court striking petitioners' jury trial demand is unreported. App., 184-185.

JURISDICTION

The court of appeals entered its judgment on October 21, 1994. App., 1-36. Petition for rehearing and for rehearing *en banc* was denied on December 1, 1994. App., 37-38. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), provides as follows:

> A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1), provides as follows:

> (a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a

> manner calculated to be understood by the average plan participant and shall be furnished in accordance with subsection 1024(b)(1) of this title.

ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1), provides as follows:

> [A]ny residual assets of a single-employer plan may be distributed to the employer if . . . (A) all liabilities of the plan to participants and heir beneficiaries have been satisfied, (B) the distribution does not contravene any provision of law, and (C) the plan provides for such a distribution in these circumstances.

STATEMENT OF THE CASE

Petitioners are a class of approximately 40,000 former participants in the Pension Plan of Gulf Oil Corporation (the "Gulf Plan" or "Plan"). This action resulted from the merger between Gulf Oil Corporation ("Gulf") and Chevron Corporation ("Chevron") in 1984 and the subsequent merger of their respective pension plans in 1986. Petitioners commenced this action after Chevron substantially and adversely affected petitioners' pension benefits under the Gulf Plan.

A. The Gulf Plan

In 1944, Gulf established the Annuities and Benefits Plan of Gulf Oil Corporation (the "A & B Plan"). The A & B Plan was a defined benefit plan, funded entirely with contributions made by Gulf. During the first thirty years of its existence, the A & B Plan and trust instruments, which Gulf revised and amended numerous times, consistently characterized Gulf's contributions to the A & B Plan as "irrevocable," to be held in trust for the "exclusive benefit of

the participants, retired participants, or their beneficiaries." The phrases "irrevocable pension fund," "funds irrevocably contributed" or "Irrevocability of Trust" appear in five separate places in the original 1944 plan and trust documents, which Gulf reprinted in a booklet and distributed to all participants. Until the enactment of ERISA thirty years later, Gulf continued to distribute to employees the entire Plan and trust texts.

Gulf later established two additional pension plans, each a defined contribution plan: the Supplemental Annuity Plan of Mene Grande Oil Company ("SAP") and the Contributory Retirement Plan ("CRP"). Gulf and eligible employees funded these two plans, which, along with the A & B Plan, were designed to satisfy the qualification requirements of the Internal Revenue Code.

Primarily to comply with ERISA, Gulf in 1975 created the Gulf Plan by amending and restating the three former plans. Neither the 1975 amendments nor any other amendments prior to the 1986 Plan merger expressed any reversionary right on Gulf's part. Moreover, in plain-language summary plan descriptions (called "SPDs") distributed after ERISA's enactment, Gulf expressly represented that it could *not* make any changes in the plan that would allow plan assets to be used for anything but the exclusive benefit of members or their beneficiaries.

B. Chevron's Partial Termination and Improper Amendments to the Gulf Plan

Chevron acquired Gulf in March of 1984. During the first two and one-half years after buying Gulf, Chevron terminated almost 11,000 of the 23,000 active Plan participants. Chevron also sold off several Gulf operations and used the proceeds to pay down the debt Chevron had

incurred in the acquisition. Moreover, from the day it acquired Gulf, Chevron single-mindedly pursued a corporate objective concerning surplus assets in the Gulf Plan and trust: preservation and use of those assets for Chevron's—and not the Gulf pensioners'—purposes. At all relevant times during and following Chevron's acquisition of Gulf, the Gulf Plan contained a surplus, *i.e.*, it had assets significantly in excess of the present value of the retirement benefits payable under the Plan.

On July 1, 1986, two years after Chevron acquired Gulf, Chevron amended the Gulf Plan. Chevron commingled or "merged" the assets of the Gulf Plan with those of the old Chevron Annuity Plan, to form the Chevron Retirement Plan. Instead of setting apart any Gulf trust funds for Gulf retiree liabilities, by merging these pension plans Chevron purported to make *all* assets of the combined plan available to pay benefits for third persons who had never participated in any Gulf Plan. Chevron amended the Gulf Plan to become "Supplement A" to the new Chevron Retirement Plan; in doing so, Chevron purported to make the existing assets of the Gulf Plan subject to a provision explicitly permitting a reversion of surplus assets to Chevron upon termination of the merged Plan.[1]

Gulf employees and retirees believed that Gulf could not, and would not, take a reversion of surplus assets because of representations Gulf made to them over the years in SPDs, Plan booklets, and other communications. Chevron and its outside counsel acknowledged and discussed this

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[1] Among other things, the merger amendments decreased the future benefit accruals of former Gulf employees while substantially increasing future pension benefits for "old Chevron" employees. The district court held that this resulted in a "horizontal partial termination." App., 72-86, 172.

understanding of the Gulf Plan in internal memos that are part of the record below. Chevron knew that it would have to disclose to Gulf's workforce any attempt to add such a reversion amendment and that such disclosure would almost certainly cause labor unrest. As a result, Chevron made a deliberate decision not to amend the Gulf Plan until reversion could be—and was—buried in a myriad of other benefit changes that it presented to the unions as part of the overall plan merger in July 1986.

Beginning in early 1986, many Gulf Plan participants who had been terminated because of the Chevron acquisition in 1984 asked Chevron to acknowledge that a partial plan termination had occurred. They asked Chevron to allocate and distribute to them, under section 10.A.2 of the Plan, their share of the Gulf pension funds, just as if the Plan had terminated. Chevron denied these requests on the sole ground that no partial termination had occurred. Chevron never determined that section 10.A.2 did *not* require allocation of a *pro rata* share of the surplus pension assets to any group adversely affected by partial termination.

C. Proceedings Below

Certain participants in the Gulf Plan brought the present action in November 1986 in the United States District Court for the Southern District of Texas. Shortly thereafter, in April 1987, other Plan participants filed a similar suit in the United States District Court for the Western District of Pennsylvania. These actions were consolidated in the United States District Court for the Southern District of Texas, which in February 1990 certified the consolidated suit as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2).

Petitioners asserted that Gulf and Chevron violated fiduciary duties, and sought reimbursement to the Gulf Plan for losses to the Plan as a result of the violations. They also alleged that during merger negotiations, Chevron misrepresented that it would, upon merger of the pension plans, set aside portions of the Gulf Plan assets to establish a reserve for then-existing retiree pensions. Furthermore, they asserted that a partial termination of the Gulf Plan had occurred, entitling them to their share of the Plan funds as well as to a *pro rata* share of the surplus assets of the Gulf Plan.

On January 4, 1990, the district court denied petitioners' timely request for jury trial. App., 184-185. Following a bench trial, the district court determined that Gulf and Chevron had breached certain fiduciary duties owed to petitioners and ordered reimbursement to the Gulf Plan accordingly. App., 149-163, 172. The court also agreed with petitioners that a partial termination of the Gulf Plan had occurred as a result of the merger with Chevron. App., 47-86, 171-172. It found that those who were participants in the CRP and SAP, the defined contribution portions of the Gulf Plan, were entitled to the surplus assets of those plans. App., 141-142, 172. On the issue of entitlement to the surplus assets of the A & B Plan portion of the Gulf Plan, however, the court ruled that petitioners were not entitled to surplus assets because the Plan provided for reversion of surplus assets to the employer. App., 103-114.

Chevron appealed, and petitioners cross-appealed. Of the many issues raised before the district court and appealed to the court of appeals, most were settled during and after trial or during the pendency of the appeal.

The court of appeals rejected petitioners' challenge to the district court's order striking their jury demand. The court

found ERISA law closely analogous to the law of trusts, an area within the exclusive jurisdiction of the courts of equity, and relied on its prior decision in *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980), to hold that ERISA claims do not entitle a plaintiff to a jury trial. App., 33-35. Moreover, the court analyzed petitioners' claims for monetary relief as analogous to actions for disgorgement of improper profits, which the court found to be restitutionary in nature. App., 35.

The court of appeals also rejected petitioners' arguments that SPDs distributed as required by ERISA § 102(a), 29 U.S.C. § 1022(a), supported their claim that the Plan did not allow employer reversion and could not be amended to provide therefor. Despite well-established precedent that such plain-language summaries control over the terms of the plan itself, the court ruled that a summary plan description controls only if the pension plan is, first, found to be ambiguous and, second, found to be in conflict with the SPD. App., 30 n.25. Based upon its lengthy preceding analysis of Plan language, the court found no ambiguity in the Plan. The court therefore ignored the SPDs, giving no consideration to what the SPDs reasonably and unambiguously conveyed to Plan participants in regard to distribution of assets upon Plan termination. *Id.*

The court of appeals further rejected petitioners' argument that upon partial termination, petitioners were entitled to a *pro rata* share of the distribution of the surplus assets. The court distinguished away a contrary decision from the Seventh Circuit, *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991), by concluding that the plan the Seventh Circuit addressed was fully, not partially, terminated. The court concluded that regardless of what ERISA or the Seventh Circuit requires upon complete termination, nothing in either mandates a

distribution of surplus assets upon partial termination or requires a particular provision in the plan to avoid that result.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit improperly characterized petitioners' claims as seeking equitable relief, taking no account of this Court's recent contrary characterization of claims under ERISA § 502(a)(1)(B) as contractual in nature. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989). While pre-*Firestone* appellate decisions generally denied ERISA plaintiffs their right to jury trial, several decisions since *Firestone* have indicated that this Court effectively overruled those prior decisions.

The Fifth Circuit also drew itself into conflict with numerous courts of appeals which have held that when a participant's claims are based upon a reasonable reading of the ERISA-required summary plan description ambiguity in a pension plan itself is irrelevant. The courts focus below on whether ambiguity in the Gulf Plan existed had the effect of destroying petitioners' reliance on the SPDs, which reasonably disclosed that any surplus under the Plan would not at any time revert to the employers.

Moreover, the Fifth Circuit's distinction between complete and partial termination to deny petitioners' request for distribution of the surplus assets is wrong, and its dismissal of the Seventh Circuit analysis in *Albedyll* puts it in conflict with that court. Whether the existence of a complete or partial termination is a meaningful fact depends, in the particular case, on whether that plan treats the difference as meaningful. The Gulf Plan does not. The Plan in fact explicitly provides that the procedures for distribution are the same, regardless of whether the termination is partial or complete.

The Fifth Circuit decision is erroneous in each of these respects, and the issues they address are important. The need for guidance from this Court is acute.

I. Petitioners Were Entitled to a Jury Trial on their Claims to Recover Monetary Relief under Section 502(a)(1)(B) of ERISA

As stated above, petitioners claim they had a right to receive the surplus that existed in the Gulf Plan as of June 30, 1986. Petitioners asserted a contractual claim under ERISA § 502(a)(1)(B) for the money due to them when Chevron partially terminated the Gulf Plan. Petitioners were entitled to a jury trial on numerous factual issues, including: (1) petitioners' contractual right to amounts due and owing when the Gulf Plan was partially terminated; (2) the exact amounts due to each claimant under the Plan, and the form of payment required; and (3) whether Chevron ever exercised any discretion, *e.g.*, whether it in fact determined that section 10.A.2 of the Plan did not require allocating surplus or paying lump sums to affected plan members upon partial termination.

Petitioners' claims for surplus assets are clearly *legal* claims for money damages in the nature of an action challenging an employer's denial of benefits, not equitable claims. It is true that "ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Nevertheless, this Court has clearly noted that "[a]ctions challenging an employer's denial of benefits before the enactment of ERISA *were governed by principles of contract law.*" *Id.* at 112

(emphasis added).[2]

Most courts of appeals addressing the issue prior to *Firestone* held that ERISA § 502(a)(1)(B) claims were equitable in nature and that, therefore, a plaintiff was not entitled to jury trial.[3] *Firestone* changed the law in this area by emphasizing the contractual nature of claims under § 502(a)(1)(B), a distinction which escaped the Fifth Circuit in its decision below. Instead the Fifth Circuit improperly characterized petitioners' contractual claims for money damages as seeking "disgorgement," and relied on its pre-*Firestone* decision of *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980), to deny them their right to jury trial.

The court in *McDonald v. Artcraft Elec. Supply Co.*, 774 F. Supp. 29, 34 (D.D.C. 1991), recently explained the significance of *Firestone* to a plaintiff's right to jury trial

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[2] In *Massachusetts Mut. Life. Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985), the Court noted that one of the very purposes of ERISA was "to protect contractually defined benefits." Moreover, this Court has acknowledged the availability of legal remedies under ERISA. *See Ingersoll-Rand v. McClendon*, U.S. —, 111 S. Ct. 478 (1990) (finding ERISA preemption of claim seeking compensatory and punitive damages in wrongful discharge action against employer who terminated employee allegedly to avoid vesting of pension fund).

[3] *See, e.g., Turner v. CF&I Steel Corp.*, 770 F.2d 43, 47 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 (4th Cir. 1985); *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. 1980); *Daniel v. Eaton Corp.*, 839 F.2d 263, 268 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988); *Wardle v. Central States, Southeast & Southeast Areas Pension Fund*, 627 F.2d 820, 829-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *In re Vorpahl*, 695 F.2d 318, 321 (8th Cir. 1982); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Blake v. Union Mut. Stock Life Ins. Co.*, 906 F.2d 1525, 1526 (11th Cir. 1990).

under ERISA § 502(a)(1)(B), and its effect on previously existing appellate decisions:

> *Firestone* marks a significant turning point in the interpretation of ERISA law. The Supreme Court views ERISA claims as analogous to contract actions prior to ERISA. *Contract actions are legal in nature.* Furthermore, they are generally fact-intensive disputes. *In other words, they are quintessential jury issues.* If a right to a jury existed prior to the passage of ERISA, then to hold that no such right exists under ERISA would "afford less protection" to employee rights than they had before the Act was passed—a result the Supreme Court squarely rejected in *Firestone*.

Id. at 34 (emphasis added) (*quoting Firestone*, 489 U.S. at 114). The *McDonald* court concluded that "for certain ERISA claims there are both a statutory and a constitutional right to a jury trial."[4] *Id.* at 36.

The Second Circuit has yet to speak definitively on this issue. As such, the district courts of that Circuit are in disarray. *See Sullivan v. LTV Aerospace & Defense Co.*, 850 F. Supp. 202, 206 (W.D.N.Y. 1994) (collecting cases). The Second Circuit itself has indicated, however, that it is not prepared to join the other courts of appeals that have

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[4] Indeed, there is a strong constitutional basis for petitioners' right to jury trial. *See McDonald*, 774 F. Supp. at 35-36. This Court has long noted that the Seventh Amendment question "depends on the *issue* to be tried rather than the character of the overall action." *Local No. 391 v. Terry*, 494 U.S. 558, 569 (1990). Because the primary issue to be tried on remand in this case concerns contractual rights and remedies—legal issues—petitioners are entitled to a jury trial. *See Tull v. United States*, 481 U.S. 412, 417-18 (1987) (characterizing the relief sought is more important than finding a precisely analogous common law action in determining whether a constitutional right to jury trial exists).

found no right to jury trial. *See, e.g., Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Dental, Pension & Supplemental Funds*, 624 F.2d 1132, 1136 (2d Cir. 1980) (expressing "reservation about the practice of taking [an ERISA claim for unpaid benefits] away from a jury, rather than setting aside an incorrect verdict"); *see also Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980) (affirming ruling that issue of determining benefits due according to terms and provisions of an ERISA plan is legal issue triable to a jury).

A confusing series of decisions also arose in the Third Circuit, which initially recognized the difference between "legal" relief provided in § 502(a)(1)(B), and the "equitable" relief provided in § 502(a)(3)(A) or (B). *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 394 (3d Cir. 1988). The *Cox* court remanded for a determination whether the plaintiff's general suit under § 502 to recover benefits due under the plan was "legal in nature" under subsection (a)(1)(B), and thus carried a jury entitlement. *Id.* Intervening decisions then specifically addressed the issue and found no jury entitlement even under § 502(a)(1)(B). *See Turner v. CF&I Steel Corp.*, 770 F.2d 43 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Pane v. RCA Corp.*, 868 F.2d 631 (3d Cir. 1989). But even in its later decision in *Cox v. Keystone Carbon Co.*, 894 F.2d 647, 649-50 (3d Cir. 1990), *cert. denied*, 498 U.S. 811 (1990), the Third Circuit has taken no account of *Firestone*.

Indeed, before *Firestone*, numerous decisions denied plan participants their right to jury trial by weak analogy to common-law actions in equity; these decisions are no longer good law after this Court's *Firestone* decision. As the *McDonald* court recognized, "the cases that have found certain ERISA claims to be equitable in nature have relied on

case law subsequently repudiated by the Supreme Court [in *Firestone*]." *McDonald*, 774 F. Supp. at 34. Indeed, the *McDonald* court correctly lists the Fifth Circuit's decision in *Calamia* as one of the cases that *Firestone* effectively overruled.

Firestone makes clear that petitioners' claims for unpaid benefits are contractual, and not in the nature of disgorgement. A substantial and growing number of recent cases addressing this issue have recognized that a plaintiff is entitled to a jury trial on claims under ERISA § 502(a)(1)(B), and have correctly refused to follow contrary decisions of the courts of appeals that predate this Court's decision in *Firestone*. *See, e.g. Sullivan v. LTV Aerospace & Defense Co.*, 850 F. Supp. 202, 210 (W.D.N.Y. 1994) ("this Court believes that in § 502(a)(1)(B) of ERISA, Congress impliedly left intact a plaintiff's right to a jury trial on a claim for recovery of unpaid benefits under an ERISA plan"); *Padilla de Higginbotham v. Worth Publishers, Inc.*, 820 F. Supp. 48, 50 (D. Puerto Rico 1993) ("The courts have begun to recognize the difference between 'legal' relief in ERISA actions, provided in 29 U.S.C. § 1132(a)(1)(B), and 'equitable' relief provided in 29 U.S.C. § 1132(a)(3)"); *see also Steeples v. Time Ins. Co.*, 139 F.R.D. 688, 693-94 (N.D. Okla. 1991); *McDonald v. Artcraft Elec. Supply Co.*, 774 F. Supp. 29 (D.D.C. 1991); *International Union v. Midland Steel Prod.*, 771 F. Supp. 860, 862-65 (N.D. Ohio 1991); *Brasher v. Prudential Ins. Co.*, 771 F. Supp. 280, 282 (W.D. Ark. 1991); *Resnick v. Resnick*, 763 F. Supp. 760, 765-66 (S.D.N.Y. 1991); *Rhodes v. Piggly Wiggly Ala. Dist. Co.*, 741 F. Supp. 1542, 1545-46 (N.D. Ala. 1990); *Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F. Supp. 882, 885-91 (S.D.N.Y. 1990); *Gangitano v. NN Inv. Life Ins. Co., Inc.*, 733 F. Supp. 342, 343 (S.D. Fla. 1990). Legal commentary arrives at the same conclusion. *See* Bersi, *The Road Less Traveled is the Better Way: New Routes to the*

Right to a Jury Trial in ERISA Section 502(a)(1)(B) Actions, 27 Cal. W.L. Rev. 431 (1991).

Petitioners recognize that the above list reflects only district court decisions. These courts, however, range across the First, Second, Eighth, Tenth, Eleventh, and District of Columbia Circuits. While apparently none of these decisions were appealed to their respective courts of appeals, this issue is of considerable importance, and the Fifth Circuit has clearly spoken. Clearly, the Fifth Circuit is out of step with the growing weight of decisional law in this area. The opinion below is contrary to important Supreme Court precedent affecting the basic statutory and constitutional right to jury trial enjoyed by the over 40,000 participants in the Gulf Plan. This Court should grant certiorari to review this important issue.

II. Chevron Could Not Revert the Surplus Assets for its Own Use Because Plain-Language Summary Plan Descriptions Distributed to Plan Participants Reasonably Disclosed That Any Surplus Under the Plan Would Not, At Any Time, Revert to the Employer.

Petitioners and Chevron fought at trial and on appeal over who is entitled under the Plan to the approximately $650 million in surplus assets from the A & B Plan that Chevron reverted to itself. Petitioners argued that ERISA allows surplus assets to revert to the employer upon partial termination only if the plan expressly provides for it. Petitioners argued that before Chevron amended the Plan in 1986, it did not expressly so provide. Petitioners argued that in fact, the opposite was true: throughout the years, the Plan itself prohibited reversion by requiring contributions to be "irrevocable." Because of the prohibition, petitioners

argued, Chevron's belated attempts to amend the plan were also ineffective.

The Fifth Circuit rejected petitioners' arguments at each step, often giving several different bases for its various conclusions. That court's analysis led it to conclude that the Plan, both as originally written and later amended, allowed Chevron to revert the surplus assets for its own uses.

While petitioners disagree with the Fifth Circuit's conclusions on each of these points, that court's analysis of the issues is ultimately irrelevant to the decision of who, as between Chevron and petitioners, is entitled to the surplus. The reason: since the time Gulf restated its pension plans in 1975 to comply with ERISA, Gulf sent Plan participants SPDs that reasonably disclosed that the surplus would not, at any time, revert to the employer. Under ERISA and decisional law of other Circuits, Chevron was bound by that description regardless of what the technical language of the Plan or any amendments could be construed to say.

ERISA mandates distribution of SPDs to all plan participants and requires that they be "written in a manner calculated to be understood by the average plan participant . . . ." ERISA § 102(a)(1), 29 U.S.C. § 1022(a)(1). The SPD must also be sufficiently "accurate and comprehensive" to apprise plan members of their rights under the plan. *Id.*

No SPD sent to Plan participants ever said the employer had any right to receive a reversion of surplus assets upon termination of the Gulf Plan. Nor did any SPD say the employer had any right to amend so as to allow such a reversion. In fact, on the question of termination, the SPD simply stated without explanation that "[i]f the Company

should ever terminate the Plan, the procedures in section 10 of the Plan would control who would get what from the trust assets."

Using plain language, the last SPD that participants received before Chevron amended the Gulf Plan in fact led the average plan member to believe that no reversion right either then existed or could exist in the future:

> The Company has the right to change the Plan. But if it does, you should know that . . . it **cannot** make any change that would allow the assets of the Plan to be used for anything but the exclusive benefit of members or their beneficiaries . . . . (Emphasis in original.)

Identical language appeared in all other SPDs distributed after passage of ERISA. This language Gulf chose unequivocally encompasses *all* assets in the Plan, including any surplus assets, and explains in the clearest possible terms that these assets are to be used for the exclusive benefit of Plan participants.

The Fifth Circuit relegated petitioners' argument concerning the controlling effect of the SPDs to a footnote. It held that SPD language is relevant *only if* the pension plan is ambiguous, and then concluded that the technical jargon of the Gulf Plan was not ambiguous. In short, the Fifth Circuit ignored the SPD. *See* App., 30 n.25.

The Fifth Circuit's holding is wrong under ERISA. It is also dangerous to plan participants everywhere. It destroys a plan participant's right to rely upon a plain-language reading of the SPD and requires instead that the participant read the plan itself and decide whether it is ambiguous. Indeed, the Fifth Circuit appears to have concerned itself *only* with the plan and construction of *its* terms. This

undermines ERISA's requirement under § 102(a)(1) that plan members be given a complete and understandable, plain-English summary plan description.

The Fifth Circuit's conclusion clearly is in conflict with decisions from other Circuits which hold that ambiguity in the pension plan itself is irrelevant, because language in an SPD controls *any* conflicting language in the Plan. *See, e.g. Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990) (the plan summary controls in the event of any conflict); *Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 140 (4th Cir. 1993) (same); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988) (same); *Senkier v. Hartford Life & Accident Ins. Co.*, 948 F.2d 1050, 1051 (7th Cir. 1991) ("The insured is protected by the fact that, in the event of a discrepancy between the coverage promised in the summary plan document and that actually provided in the policy, he is entitled to claim the former"); *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) ("It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan"); *see also Price v. Provident Life & Accident Ins. Co.*, 2 F.3d 986, 988 n.1 (9th Cir. 1993) (noting that "the ERISA endorsement is part of the plan summary, the terms of which are binding on Provident and which govern if the summary conflicts with the policy").[5]

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[5] It had appeared that the Fifth Circuit would follow this uninterrupted line of decisions. *See Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991). Instead, the Fifth Circuit has now clearly determined (and denied *en banc* review of that determination), that any challenge by a plan participant must initially be judged by the language of the plan itself. To the contrary, the initial and controlling inquiry should be on the reasonable construction of SPD language. In this case, it is a distinction with meaning, for a reasonable construction of the SPD

The proper focus under all of these decisions is whether an ambiguity exists in the SPD that creates a conflict with the Plan, not the other way around. Whether the Plan itself is ambiguous is irrelevant. The Fifth Circuit wholly neglected the real issue: does the SPD reasonably and unambiguously disclose to participants in the Gulf Plan that the surplus could revert to Chevron, either by amendment or otherwise? The answer clearly no.

Petitioners respectfully request that this Court grant certiorari to resolve this conflict.

III. The Partial Termination of the Plan Entitled Plan Participants to an Allocation of the Surplus Assets.

The district court found that a partial termination of the Gulf Plan occurred between March 1984, when Gulf and Chevron merged, and July 1986, when Chevron merged the pension plans. App., 47-86, 172. Petitioners are therefore entitled to a *pro rata* share of the surplus assets in the Plan. The Fifth Circuit disagreed because it fundamentally misapplied ERISA law and created a conflict with the Seventh Circuit's decision in *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 256 (7th Cir. 1991).

ERISA contains a statutory presumption that unless a plan contains a clear expression of reversionary intent, assets on termination are to be distributed to the participants and beneficiaries. ERISA § 4044(d), 29 U.S.C. § 1344(d). Under this statute, "unless the plan specifically provides for reversion to the employer, surplus assets go to beneficiaries and participants." *Albedyll,* 947 F.2d at 256.

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entitles Plan participants to relief.

The Gulf Plan did not contain a clear expression of reversionary intent as of the date of the partial termination, June 30, 1986. Instead, section 10.A.2 of the Plan explained that all assets in the plan were to be distributed upon termination:

> Distribution of Assets. Upon termination of the Plan the rights of members to the benefits accrued under the Plan to the date of such termination, to the extent then funded, shall be nonforfeitable. All of the assets held in trust, after provision for any properly chargeable expenses, shall be used solely for the members, pensioners, spouses, beneficiaries and joint pensioners until all liabilities under the Plan shall have been satisfied in full. The Benefits Committee shall determine on the basis of an actuarial valuation the share of the funds of the Plan allocable to each member, pensioner, spouse, and joint pensioner in the following order:
>
> [there follows a six-tired schedule of distribution directives].
>
> In the event of a partial termination of the Plan the provisions of this Section 10.A.2 shall be applicable to the members affected by such partial termination.
>
> In no event shall any part of the Plan assets held in trust or any income on it, prior to the satisfaction of all liabilities under the Plan, revert to the Company or be used other than for the members, pensioners, spouses, beneficiaries and joint pensioners.

ERISA presumes no reversion unless the plan clearly expresses reversionary intent; the Gulf Plan did not clearly

express reversionary intent. Therefore, applying the presumption to the Plan language leads to only one conclusion: if the Gulf Plan had terminated on June 30, 1986, all of the Plan's assets—including the surplus—would have been subject to distribution to the beneficiaries and participants. This Court should note that the language of section 10.A.2 of the Plan quoted above cannot be distinguished in any meaningful way from the language the Seventh Circuit quoted in *Albedyll*, 947 F.2d at 256.

Despite ERISA's presumption and the Plan's language, the Fifth Circuit refused to recognize petitioners' right to a distribution of the surplus. The Fifth Circuit decided that whatever ERISA might require upon complete termination, it does not require distribution on a partial termination.

The Fifth Circuit missed the point. Section 411(d)(3) of the Internal Revenue Code mandates that upon a partial termination, benefits then accrued and funded under a plan must be vested in the plan participants. The plan's particular provisions determine what, if any, additional collateral consequences follow. *See Vornado, Inc. v. Trustees of the Retail Store Employees' Union*, 829 F.2d 416, 421 (3d Cir. 1987); *United Steelworkers v. Harris & Sons Stell Co.*, 706 F.2d 1289, 1299 (3d Cir. 1983). In this case, the particular plan provisions that determine whether and to whom assets are allocated on termination are *the same* as those that govern the allocation of assets on partial termination. Section 10.A.2. of the Plan, quoted above, expressly provides that it was applicable "[i]n the event of a partial termination . . . to the members affected by such partial termination."

With respect to asset distribution, the Plan simply does not distinguish between a partial termination and a termination. The Fifth Circuit improperly limited the Seventh Circuit's

conclusions in *Albedyll* to complete termination scenarios, thus limiting the breadth of ERISA's presumptions concerning employer reversion and the intent of the specific plan at issue. This Court should grant the petition for certiorari to resolve this conflict and correct the Fifth Circuit's error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for a Writ of Certiorari was served on this the March 1, 1995, addressed as follows:

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APPENDIX A

Dean BORST, et al., Plaintiffs-Appellees Cross-Appellants,

v.

CHEVRON CORP., et al., Defendants-Appellants Cross-Appellees.

No. 91-2747.

United States Court of Appeals,
Fifth Circuit.
Oct. 21, 1994.

Rehearing and Suggestion for Rehearing
En Banc Denied Dec. 1, 1994.

Before POLITZ, Chief Judge, GARWOOD and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:

This class action, brought under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ERISA), arose out of the merger of Gulf Oil Corporation (Gulf) and Chevron Corporation (Chevron) in 1984 and the subsequent merger of the pension plans of the two companies in 1986. Plaintiffs, approximately 40,000 former participants of the Pensio Plan of Gulf Oil Corporation (Gulf Plan), brought this action complaining of various matters occurring in connection with the merger of the two companies and their respective pension plans. Defendants include Chevron, Gulf, the Gulf Plan, the Chevron Corporation Retirement Plan (Chevron Plan), and

the Benefits and Pension Committees of the Gulf Plan, including the members of both commitees.

Both parties appeal portions of the district court's decision, *In re Gulf Pension Litigation*, 764 F.Supp. 1149 (S.D. Tex. 1991). Since oral argument before this court, the parties have settled those portions of the district court's rulings which were the subject of Chevron's appeal. Our primary concern is whether the plaintiffs ae entitled to the surplus assets in the Gulf Plan upon a partial or full termination of the Plan.[1] We conclude they are not.

Factual Background

We begin with a brief excursion into the history of the Gulf Plan, and the effect on it of Gulf's merger with Chevron. In 1944, Gulf established the Annuities and Benefits Plan of Gulf Oil Corporation (the A & B Plan). The A & B Plan was a defined benefit plan, funded entirely with contributions made by Gulf.[2] Gulf later established two

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[1] Surplus assets, or "residual assets" as termed in ERISA, are "assets in excess of those necessary to satisfy defined benefit obligations...." Wilson v. Bluefield Supply Co., 819 F.2d 457, 464 (4th Cir.1987). The parties concede that both the Gulf and Chevron Plans are each, at this time, substantially overfunded.

[2] The district court explained the difference between defined benefit plans and defined contribution plans:

> "Unlike a defined contribution plan, under which the benefits an employee receives are contingent upon the funds contributed and the investment return on plan assets, in a defined benefit plan the plan itself defines the benefits to be paid. If the employer's contribution and investment return are inadequate to fund those benefits, normally the employer must make additional

additional pension plans, each a defined contribution plan: the Supplemental Annuity Plan of Mene Grande Oil Company (SAP), established in 1957, and the Contributory Retirement Plan (CRP), established in 1963 (a continuation of the Employees' Savings Plan of Gulf Oil Corporation which had been established in 1950).[3] These latter two plans--the SAP and CRP--were funded with contributions by Gulf as well as with contributions by eligible employees. All three plans were designed to satisfy the qualification requirements of the Internal Revenue Code. 26 U.S.C. § 401(a).

In 1975, Gulf created the Gulf Plan by amending the three former plans to provide for central administration of the plans.[4] Although the Gulf Plan was governed by a single trust agreement beginning in 1979, the trust funds for each plan remained separate, and the benefits under each continued to be calculated independently. The Gulf Plan continued under this arrangement until July 1986, when it was amended to become part of the Chevron Plan, an employer funded defined benefit plan.

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contributions to the plan." In re Gulf Pension Litigation, 764 F.Supp. at 1161-1162 n. 1.

In determining its taxable income for federal income tax purposes, an employer generally may deduct its contributions to a pension plan meeting federal qualifications.

[3] Mene Grande Oil Company was a Venezuelan subsidiary of Gulf.

[4] The 1975 amendments were also designed to ensure that the Gulf Plan met the qualification requirements imposed by ERISA, enacted in 1974.

In January 1984, Gulf learned that a group led by T. Boone Pickens planned a hostile takeover of the company. Gulf sought protection from the takeover attempt by soliciting a friendly merger with Chevron. The two companies signed a merger agreement in March 1984. During a subsequent two-year interim period the two companies operated independently under a standstill agreement while the Federal Trade Commission and Chevron-Gulf integration teams determined how to complete the merger.

On July 1, 1986, the assets of the Gulf Plan were commingled with those of the 1933 Chevron Corporation Annuity Plan to create the Chevron Plan. At the same time, defendants amended the Gulf Plan to become a supplement to the Chevron Plan. As a result of this amendment, the Gulf Plan became subject to section 18.d of the Chevron Plan, which expressly provided for the reversion of surplus assets to Chevron upon termination of the merged Plan.

In early 1986, participants in the Gulf Plan who had been terminated due to the merger with Chevron, sought confirmation from Chevron that a partial termination of the Plan had occurred, entitling them to benefits under the Plan. These former Gulf employees asked Chevron to allocate and distribute to them their share of the Plan funds, including surplus assets, as though there had been a full termination. Chevron refused both requests.

Proceedings Below

Plaintiffs, Dean Borst, *et al.*, brought the present action in November 1986 in the United States District Court for the Southern District of Texas. Shortly thereafter, in April 1987, plaintiffs Harry Back, et al., filed a similar suit in the United States District Court for the Western District

of Pennsylvania. On the defendants' motion, the Back lawsuit was transferred to Texas and consolidated with the Borst action. On February 26, 1990, the district court certified the consolidated suit as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2). In their lawsuit, plaintiffs sought reimbursement to the Gulf Plan for claimed losses to the Plan as a result of alleged violations of fiduciary duties by Gulf and Chevron.[5] They also alleged that Chevron, during merger negotiations, misrepresented that it would, upon merger of the pension plans, set aside portions of the Gulf Plan assets to establish a reserve for then-existing retiree pensions. Furthermore, they asserted that a partial termination of the Gulf Plan had occurred, entitling them to their share of Plan funds as well as to a pro rata share of the surplus assets of the Gulf Plan.

Following a bench trial, the district court determined that Gulf and Chevron had breached certain fiduciary duties owed to plaintiffs and ordered reimbursement to the Gulf Plan accordingly. The court also agreed with the plaintiffs that a partial termination of the Gulf Plan had occurred as a result of the merger with Chevron. It found that those plaintiffs who were participants in the CRP and SAP, the defined contribution portions of the Gulf Plan, were entitled

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[5] The alleged breaches of fiduciary duty concerned (i) the effect, of assets transferred by the Gulf Plan to a pension plan to be established by Cumberland Farms for certain former employees of Gulf, on payments to be made to Chevron for the sale of certain Gulf assets to Cumberland Farms, and (ii) the payment of Gulf Plan management fees out of the assets of the Gulf Plan rather than by Gulf. The parties have settled their claims arising from these issues, removing them from our consideration on this appeal.

to the surplus assets of those plans.[6] On the issue of entitlement to the surplus assets of the A & B portion of the Gulf Plan, however, the court ruled that the plaintiffs were not entitled to surplus assets because the Plan provided for reversion of surplus assets to the employer.

Chevron appealed, and plaintiffs cross-appealed. Of the variety of issues raised before the district court, most were settled during and after trial or during the pendency of this appeal. We consider here, inter alia, whether the plaintiffs are entitled to a pro rata share of the surplus assets of the A & B Plan. [7]

Discussion

I. Partial Termination of Gulf Plan

Plaintiffs contend that a partial termination of the Gulf Plan occurred during the interim period between March 1984, when Gulf and Chevron signed the corporate merger agreement, and July 1986, when the two pension plans were finally merged. Accordingly, they argue, this partial

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[6] The district court provided for immediate distribution of the surplus assets of the CRP and SAP based on its determination that those plans were wasting trusts, as membership in them had been closed, and no employee contributions had been made, since December 31, 1970, and they were so substantially overfunded that current earnings on their assets would alone be sufficient to pay all benefits and still add to the surplus. The parties have settled their claims concerning the CRP and SAP; we confine our discussion of these plans to comparison with the A & B Plan.

[7] For purposes of our discussion, references to the A & B Plan also denote the A & B portion of the Gulf Plan as it existed in 1986 at the time of the merger into the Chevron Plan.

termination entitled them to a pro rata share of the surplus assets in that Plan.[8]

The district court agreed with the plaintiffs that a partial termination had occurred. It concluded that both vertical and horizontal partial terminations of the Gulf Plan occurred during the interim period between March 1984 and July 1986.[9] The court determined, however, that the partial

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[8] In situations where a plan provides for reversion of surplus assets to the employer, the Internal Revenue Code allows such reversion only upon a complete plan termination. 26 U.S.C. § 401(a)(2) (only after satisfaction of all liabilities). See also 26 C.F.R. s 1.401-2(b)(1) ("The intent and purpose in section 401(a)(2) ... is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations....") (emphasis added). Section 411(d)(3) of the Internal Revenue Code requires that a plan, in order to be qualified, provide that "upon its termination or partial termination ... the rights of all affected employees to benefits accrued to the date of such termination, [or] partial termination ... to the extent funded as of such date ... are nonforfeitable." 26 U.S.C. § 411(d)(3).

[9] The determination of whether a partial termination has occurred is made "with regard to all the facts and circumstances in a particular case." 26 C.F.R. § 1.411(d)-2(b)(1). Such facts and circumstances may include: "the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan." *Id.* In addition, a partial termination may be deemed to occur if, as a result of a cessation or decrease in future benefit accruals under the plan, "a potential reversion to the employer, or employers, maintaining the plan ... is created or increased." *Id.* at § 1.411(d)-2(b)(2).

In general, the term "vertical partial termination" refers to a partial termination involving the exclusion of a group of participants from continuing coverage under a plan. The determination of whether a vertical partial termination has occurred generally is based on a consideration of the entire period in question: here, from March 1984

termination did not entitle plaintiffs to any part of the A & B Plan surplus assets. As to vesting of benefits, the district court noted regarding the vertical partial termination that Chevron agreed to vest in their then accrued A & B Plan benefits all participants terminated from Gulf employment during that March 1984 to July 1986 period, and regarding the horizontal partial termination the court decreed that all former Gulf employees employed by Chevron on July 1, 1986 were vested in their then accrued A & B Plan benefits. The issues concerning vesting of accrued benefits have been settled between the parties and are not at issue on this appeal, and as a part of the settlement plaintiffs do not defend the district court's finding that horizontal partial termination occurred. Plaintiffs do contend, however, that the district court, having correctly (according to plaintiffs) found a vertical partial termination, erred by holding that

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through June 1986. Affected employees are those who ceased participation in the Gulf Plan, by termination of employment, during that period, other than those employees whose termination was not the result of the merger and those employees who were transferred to another company. If either the number or the percentage of such excluded employees is "significant," a vertical partial termination has occurred.

The term "horizontal partial termination" refers to a partial termination involving a decrease or cessation in future benefit accruals. The decision of whether a horizontal partial termination has occurred is generally made by determining whether a cessation or decrease in future benefit accruals has occurred, and, if so, whether and to what extent a potential reversion to the employer maintaining the plan is thereby created or increased.

In the present case, the district court based its conclusion that a vertical partial termination had occurred on its finding that both the number of employer-initiated terminations of non-vested participants (6,427, by one method of calculation) and the percentage by which those terminations reduced the number of non-vested participants (45.2 percent) were significant. *In re Gulf Pension Litigation*, 764 F.Supp. at 1170.

those former Gulf employees affected thereby were not entitled to their pro rata share of the A & B Plan's surplus assets.

Chevron had urged us to vacate the district court's ruling that the A & B Plan had partially terminated as unnecessary to the portions of its judgment still in issue because neither ERISA nor the language of the Gulf Plan required distribution of surplus assets to the plaintiffs in the event of either a partial or full termination of the Plan.[10]

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[10] Chevron's concern with this portion of the district court's ruling was the potential tax effect should the Internal Revenue Service (IRS) retroactively disqualify the Chevron Plan as a result of the thus found partial termination.

Following the merger of the Gulf and Chevron Plans, Chevron submitted an Application for Determination for Defined Benefit Plan to the IRS, seeking a determination as to whether a partial termination of the Gulf Plan had occurred during the interim period between March 1984 and June 30, 1986. On December 7, 1987, the IRS issued an opinion letter finding that no partial termination had occurred and, therefore, that the Gulf Plan was not subject to the full vesting requirements of 26 U.S.C. § 411(d)(3). The district court concluded that it owed no deference to the IRS determination, *In re Gulf Pension Litigation*, 764 F.Supp. at 1172, and subsequently ruled that the Gulf Plan had suffered both vertical and horizontal partial terminations. In light of the district court's decision, the IRS subsequently reconsidered its earlier letter in favor of Chevron. In connection with its subsequent review of the matter, the IRS considered: whether a partial termination had occurred; whether the Chevron Plan should be retroactively disqualified; and, if so, whether Chevron was entitled to relief under 26 U.S.C. § 7805(b), which permits the Secretary of the Treasury to prescribe the extent to which a ruling should be applied without retroactive effect.

In a Technical Advice Memorandum issued in 1992, the IRS concluded that a vertical partial termination of the Gulf Plan had occurred when, as a consequence of a single corporate event (the merger), both a significant number and a significant percentage of participants in the Plan were terminated without being vested in their accrued benefits. The IRS

As discussed below, we conclude that the plaintiffs were not entitled to surplus assets under the A & B Plan whether or not a partial termination, vertical or horizontal, occurred.[11]

II. Entitlement to Surplus

Plaintiffs assert that they are entitled to a pro rata share of the surplus assets in the A & B portion of the Gulf Plan. They argue that ERISA prohibits reversion of any plan assets unless the plan language contains an explicit reversion provision. Plaintiffs rely upon ERISA section 403(c)(1), a part of section 403 which is entitled "Establishment of Trust." Section 403(c)(1) directs that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). This provision, however, is subject to, *inter*

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found that no horizontal partial termination had occurred. Finally, the IRS determined that, because Chevron had relied in good faith on its earlier ruling that no partial termination of the Gulf Plan had occurred, Chevron was entitled to section 7805(b) relief for the period beginning January 1, 1984, and continuing through December 31, 1991, at which time Chevron had fully vested all employees affected by the vertical partial termination.

[11] Because we do not consider whether or not a partial vertical (or horizontal) termination occurred, the district court's ruling on this issue is not conclusive between the parties. *Dow Chemical v. United States Envtl. Protection Agency*, 832 F.2d 319, 323 (5th Cir.1987) (" 'The federal decisions agree that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision.' ") (quoting 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4421 (1981)); RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. o (1982).

alia, ERISA section 4044(d)(1), which specifically addresses allocation of surplus assets upon the final termination of a plan. Section 4044(d)(1) provides:

> "(1) Subject to paragraph (3) [addressing distributions of plans containing employee contributions], any residual assets of a single-employer plan may be distributed to the employer if--
>
> "(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> "(B) the distribution does not contravene any provision of law, and
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> "(C) the plan provides for such a distribution in these circumstances." 29 U.S.C. § 1344(d)(1) (emphasis added).[12]

In contrast, section 4044(d)(3)(A) provides that "[b]efore any distribution from a plan pursuant to paragraph (1) [above quoted], if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities ... such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries...." (emphasis added).

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[12] Similarly, the Pension Benefit Guaranty Corporation regulations providing a formula for distribution of surplus assets at plan final termination to plan beneficiaries, 29 C.F.R. § 2618.32(a), apply only where the plan does not "provide[ ], as of the date of plan termination, for the return of residual assets to the employer" or where a provided for distribution "violate[s] any provision of law." 29 C.F.R. § 2618.30(a).

Plaintiffs also seek support for their claim in the common law of trusts. Their premise for this argument is that, because pension benefits are a source of additional compensation for employees, the pension trust is not a gratuitous trust. *Ball v. Victor Adding Machine Co.*, 236 F.2d 170, 173 (5th Cir.1956). Indeed, under common law, where surplus assets remained at termination of a trust established for consideration, a resulting trust of the surplus arose in favor of the person furnishing the consideration. RESTATEMENT (SECOND) OF TRUSTS § 434 (1959). However, although plaintiffs have rendered consideration to Gulf in the form of their services, this is not the situation envisioned by section 434. A trust established for consideration, in the context of that section, is one in which the owner of the property transfers it upon a trust to certain beneficiaries and receives consideration for the transfer from a third party, not from the beneficiaries themselves.

Further, while specified pension benefits in an employer funded defined benefit plan may be viewed as compensation for services rendered, an employer is not required by law to provide such benefits and if it undertakes to do so it is not required to do more than pay, or provide for payment of, those particular benefits. *See Malia v. General Electric Co.*, 23 F.3d 828, 832 (3d Cir. 1994) (" 'A defined benefit plan gives current and former employees property interests in their pension benefits but not in the assets held by the trust.' "). An entirely employer funded defined benefit plan pension trust is therefore more akin to a gratuitous trust so far as concerns surplus assets, as to which ERISA so markedly distinguishes between those attributable to employee contributions and those attributable to employer contributions (thus suggesting that employer contributions are not a form of recontributed wages for such purpose). Where a gratuitous trust is fully performed without exhausting the trust estate, a resulting trust of the

surplus is presumed to arise in favor of the settlor. RESTATEMENT (SECOND) OF TRUSTS § 430. This principle has been looked to in holding an employer entitled to surplus assets on termination of an employer funded defined benefit pension plan. *See Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir.1987) (" 'Surplus' is the term used in the common law of trusts to describe any remaining assets in a trust after its purpose has been fulfilled. Under such circumstances, a 'resulting trust' for the benefit of the creator of the original trust arises by operation of law, unless he manifested a contrary intent") (citing Restatement (Second) of Trusts § 430); *Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 555 F.Supp. 257, 260 (D.D.C.1983), *aff'd* mem., 729 F.2d 863 (D.C.Cir.1984) ("the common law of trusts provides that an employer can retain such a surplus").

Plaintiffs claim that the language of the A & B Plan did not contain an explicit reversion provision as they assert is required by section 4044(d)(1), 29 U.S.C. § 1344(d)(1). They rely on *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 256 (7th Cir.1991) ("unless the plan specifically provides for reversion to the employer, surplus assets go to beneficiaries and participants"). However, we note that section 4044(d)(1) merely requires that a plan "provide[ ]" for distribution of surplus assets to an employer, it does not say that the provision must be specific, explicit or express. In any event, *Albedyll* is a total termination case,[13] and section 4044(d)(1) does not address

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[13] As also is *Rinard v. Eastern Company*, 978 F.2d 265 (6th Cir.1992), *cert. denied*, --- U.S. ----, 113 S.Ct. 1843, 123 L.Ed.2d 468 (1993), which followed *Albedyll*, and which involved the total termination of the "Pension Plan for Hourly-Rated Employees of the Patin Manufacturing Company." *See Id.* 978 F.2d at 266-267.

a partial termination.[14] Internal Revenue Code section 401(a)(2) allows employer reversion only on complete termination. 26 U.S.C. § 401(a)(2) (only after satisfaction of all liabilities). *See also* 26 C.F.R. § 1.401-2(b)(1). Internal Revenue Code section 411(d)(3) requires that a plan, in order to be qualified, provide that "upon its termination or partial termination ... the rights of all affected employees to benefits accrued to the date of such termination, [or] partial termination ... to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable." As previously noted, all participants in the A & B Plan who were terminated from Gulf during the March 1984-July 1986 period, and all former Gulf employees employed by Chevron on July 1, 1986, have been fully vested in their accrued A & B Plan benefits. Nothing in ERISA or the Internal Revenue Code mandates a distribution of any surplus assets on a partial termination or requires any particular provision in a plan in order to avoid such a result. *See, e.g., Chait v. Bernstein*, 835 F.2d 1017, 1021 (3d Cir.1987) (in a partial termination § 411(d)(3) "should not be extended to apply to surplus assets ... in a defined benefit plan"); *Van Orman v. American Insurance Co.*, 680 F.2d 301, 313 (3d Cir.1982) (only rights to surplus are at complete termination under § 4044); *Walsh v. Great Atlantic & Pacific Tea Co. Inc.*, 96 F.R.D. 632, 652 (D.N.J.1983) ("partial termination[ ] ... would only result in those benefits defined in the 'Benefits' portion of the plan becoming non-forfeitable.... The persons affected by the partial termination would not become entitled then and there to a pro rata share of any excess assets. As long as the remainder of the plan remains ongoing, 'excess assets' is a meaningless concept, since the amount of any surplus can only be calculated after a complete termination of the

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[14] Nor do 29 C.F.R. §§ 2618.30(a) and 2618.32(a), *see* note 12 *supra*.

plan"), *aff'd*, 726 F.2d 956 (3d Cir.1983). Nor can we construe "benefits accrued" under § 411(d)(3) to encompass a right, not specified in the plan itself, to a share of surplus assets in a defined benefit employer funded plan. Treasury Regulation 1.411(a)-7(a) provides that in the case of a defined benefit plan "accrued benefit" for purposes of § 411 generally "refers only to pension or retirement benefits" and does "not include ancillary benefits not directly related to retirement benefits." 26 C.F.R. 1.411(a)-7(a).[15] This conclusion likewise follows from *Malia*, where the Court held that "benefits" under § 1344 does not include a right to residual assets. *Id.* 23 F.3d at 830-831. And, *Malia* cited with approval the district court's opinion in the present case. Malia, 23 F.3d at 832. Further, in *Mead Corp. v. Tilley*, 490 U.S. 714, 722-23, 109 S.Ct. 2156, 2162, 104 L.Ed.2d

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[15] Section 1.411-7(a) provides in part as follows: "(a) Accrued benefit. For purposes of section 411 and the regulations thereunder, the term 'accrued benefit' means--

(1) Defined benefit plan. In the case of a defined benefit plan--

(i) If the plan provides an accrued benefit in the form of an annual benefit commencing at normal retirement age, such accrued benefit, or

(ii) If the plan does not provide an accrued benefit in the form described in subdivision (i) of this subparagraph, an annual benefit commencing at normal retirement age which is the actuarial equivalent (determined under section 411(c)(3) and § 1.411(c)-(5) of the accrued benefit determined under the plan. In general, the term 'accrued benefits' refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (*see* section 411(a)(9) and paragraph (c)(3) of this section), life insurance benefits payable as a lump sum, incidental death benefits, current life insurance protection, or medical benefits described in section 401(h)."

796 (1989), the Court held that the comparable section 4044(a) "in no way indicates an intent to confer a right upon plan participants to recover unaccrued benefits" and that "all other benefits under the plan" as used in section 4044(a)(6) "can refer only to the allocation of benefits provided by the terms of the terminated plan." Finally, to construe "benefits accrued" in section 411(d)(3) as including a share in surplus assets would necessarily preclude an employer from ever reserving the right to receive any residual assets under § 4044(d)(1).

Consequently, we conclude that plaintiffs' rights to a pro rata share of residual or surplus assets on partial termination must rest on some provision of the plan itself, and not merely on section 4044(d)(1) or section 411(d)(3). We likewise conclude that unless the plan itself provided for such rights or precluded amendment providing for reversion of surplus to the employer on complete termination, then the partial termination did not of itself prevent such a reversionary amendment thereafter. *See Chait*, 835 F.2d at 1022 ("we find no authority that holds that a partial termination ... precludes further plan amendments which do not interfere with the employees' anticipated and calculated rights under a defined benefit plan"). It is settled that a plan amendment may validly provide for reversion of surplus assets to the employer on final termination of an employer funded defined benefit pension plan. *See Outzen v. FDIC*, 948 F.2d 1184 (10 Cir.1991); *Wilson*, 819 F.2d at 465; *Chait*. Accordingly, we turn now to the Plan language.

A. Language of the A & B Plan

Plaintiffs base their argument on the language of section 10A-2 of the Plan, which governs the distribution of assets on termination of the Plan, viz:

"Distribution of assets. Upon termination of the Plan the rights of members to the benefits accrued under the Plan to the date of such termination, to the extent then funded, shall be nonforfeitable. All of the assets held in trust, after provision for any properly chargeable expenses, shall be used solely for the members, pensioners, spouses, beneficiaries and joint pensioners until all liabilities under the Plan shall have been satisfied in full. The Benefits Committee shall determine on the basis of an actuarial valuation the share of the funds of the Plan allocable to each member, pensioner, spouse, and joint pensioner in the following order:

[there follows a six-tiered schedule of distribution directives]

....

In the event of a partial termination of the Plan the provisions of this Section 10A-2 shall be applicable to the members affected by such partial termination.[16]

In no event shall any part of the Plan assets held in trust or any income on it, prior to the satisfaction of all liabilities under the Plan, revert to the Company or be used other than for the members, pensioners, spouses, beneficiaries and joint pensioners." (emphasis added)

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[16] This sentence was added to the Plan by a 1982 Plan amendment.

The six-tiered schedule of distribution set forth in section 10A-2 as above indicated does not contain any direction for distribution or allocation of surplus assets. Its allocations are only up to the amount of accrued benefits.

Section One of the 1944 Agreement of Trust of the A & B Plan echoes the language of section 10A.2:

> "The Corporation hereby establishes with the Trustee a trust, effective as of January 1, 1944, which shall comprise such payments as shall from time to time be made to the Trustee by or on behalf of the Corporation for the purposes of the Plan.... Any and all contributions made by the Corporation shall be irrevocable and no part of the corpus of the Fund nor any income therefrom shall at any time prior to the satisfaction of all liabilities under the Plan revert to the Corporation or be used for or diverted to purposes other than for the exclusive benefit of participants, retired participants or their beneficiaries under the Plan." (emphasis added)

In particular, plaintiffs rely on the language providing that Gulf's contributions to the Plan were to be "irrevocable" and that the funds were to be used "solely for" or "for the exclusive benefit of" the plan participants. Defendants contend that these phrases, and the rights created thereby, are qualified by the phrases "until all liabilities under the Plan shall have been satisfied in full" and "prior to the satisfaction of all liabilities under the Plan." This language,

defendants argue, implies that reversion to the employer is contemplated once all liabilities are satisfied.[17]

1. *Prior to the satisfaction of liabilities*

Although section 10A.2 does declare that Plan assets are not to revert to the employer, that language is qualified by the phrase "prior to the satisfaction of all liabilities under the Plan." Plaintiffs maintain that this phrase creates, at best, an implied reversion; they contend that ERISA section 4044(d)(1) requires an explicit reversion provision, citing *Albedyll*. However, as noted, section 4044(d)(1) does not apply to partial terminations, and *Albedyll* was a final, not a partial, termination case. Further, the *Albedyll* plan contained a section which the court interpreted "to provide for pro rata distribution of plan assets to the participants upon termination." In addition, an early outline of the plan "clearly indicated that the company could recover none of the contributed assets."

Other cases, dealing with plans having language more similar to that now before us, but without an express employer reversion provision, have allowed an employer to recapture surplus assets upon termination of the plan. *See Outzen v. Fed. Deposit Ins. Corp. ex rel. State Examiner of*

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[17] The A & B Plan contains no explicit statement prohibiting employer reversion of surplus assets. In addition, as noted, the formula set forth in section 10A.2 of the A & B Plan for distribution of Plan assets does not contain any direction for the allocation of surplus assets to participants.

In contrast, the CRP, for example, contained no language impliedly reserving a right of reversion by Gulf, barred any amendment that would permit such a reversion, and allocated surplus assets to participants upon full termination of the plan. *In re Gulf Pension Litigation*, 764 F.Supp. at 1192.

Banks, 948 F.2d 1184, 1186-87 (10th Cir.1991) (where plan provided funds could not be used other than for the exclusive benefit of participant prior to the satisfaction of all liabilities, court held later amendment adding express reversion provision was valid).

Plaintiffs mount a second attack on the "prior to" phrase of section 10A.2, claiming that it is mere "boilerplate" language required by tax law. The phrase in question was part of section 165(2) of the Revenue Act of 1938, and became section 165(2) of the Internal Revenue Code of 1939. 53 Stat. § 165(2) (1939). It has been carried over into the present Internal Revenue Code.[18] Plaintiffs contend that Gulf's use of the language in the A & B Plan was mere repetition of the 1938 statute.

In response, Chevron argues that the legislative history of section 165 supports reading the A & B Plan to allow employer reversion. The "prior to" phrase was added to the Revenue Act of 1938 to allow employers to recapture surplus assets without losing their exempt status under the tax laws.[19] S. REP. No. 1567, 75th Cong., 3d Sess. 24

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[18] 26 U.S.C. § 401(a)(2) establishes that a trust may be qualified

> "if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be ... used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries...."

[19] The 1942 Treasury Regulations discussing section 165 of the 1938 Revenue Act explain:

(1938), reproduced in 1939-1 C.B. 779, 796. Thus, the "prior to" language of section 165 of the 1938 Revenue Act did not require a rote phrase, without meaning or implication. Instead, it offered employers the ability, if desired, to establish a qualified pension plan in which the employer, upon final termination, received the surplus assets.

Based on the foregoing, we hold that in the context of section 10A-2 of the Plan, with its distribution allocation provisions not reaching surplus assets, the phrases "until all liabilities under the Plan shall have been satisfied in full" and "prior to the satisfaction of all liabilities under the Plan" at least implied the right to reversion in Gulf. We consider now whether any other language in the Plan limited or prohibited that right.

"The intent and purpose in section 165(a)(2) of the phrase 'prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust' is to permit the employer to reserve the Right to recover at the termination of the trust, and only at such termination, such balance in the trust as is due to erroneous actuarial computations during the previous life of the trust. A balance due to an 'erroneous actuarial computation' is the surplus arising because actual requirements differ from the expected requirements based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding, all as made by a careful person skilled in calculating the amounts necessary to satisfy pecuniary obligations of such a nature." Treasury Regulation § 29.165-2(b) (1942); 26 C.F.R. § 29.165-2(b) (1944 Cumulative Supplement at 6368) (emphasis added).

This regulation continues in effect today, without presently relevant substantive change. 26 C.F.R. § 1.401-2(b)(1).

2. *Irrevocability provision*

Plaintiffs assert that the "prior to" language discussed above is inconsistent with the provision that Gulf's contributions to the A & B Plan be irrevocable. The Plan has contained the "irrevocable" language since its inception in 1944.[20] Chevron claims that the drafters of the Plan were merely parroting references in the tax law as it existed in 1944 when the Plan was created. While the 1939 Internal Revenue Code did not specifically use the term "irrevocable," it decreed that a trust forming part of a pension plan would not be taxable under the Code

> "if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the trust, for any part of the corpus or income to be ... used for, or diverted to, purposes other than for the exclusive benefit of his employees." Internal Revenue Code, 53 Stat. § 165(2) (1939).

The essence of this Code provision is that an employer may not revoke, or use for his own purposes, any part of corpus or income of the pension trust. Our reading of this provision, to require an employer's contributions to be "irrevocable," is supported by the immediately succeeding

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[20] Section 10 of the 1944 Plan provided:

> "In order further to implement the Plan the Corporation has entered into an Agreement of Trust to the end that such funds, as may be irrevocably contributed from time to time for the payment of all or any part of the annuities under the Plan, shall be segregated from the Corporation's own assets and held in trust for the exclusive benefit of the participants[.]"

section of the 1939 Code, which governs "Revocable Trusts."[21] Thus, Gulf's use of the term "irrevocable" in the A & B Plan is not extraordinary, as plaintiffs contend, but merely a rephrasing of the then-current tax code provision governing pension trusts.

Furthermore, we agree with Chevron that "revocation" and "reversion" are not synonymous terms.

> "A power to revest or revoke may in economic fact be the equivalent of a reversion. But at least in the law of estates they are by no means synonymous. For, generally speaking, the power to revest or to revoke an existing estate is discretionary with the donor; a reversion is the residue left in the grantor on determination of a particular estate." *Helvering v. Wood*, 309 U.S. 344, 347, 60 S.Ct. 551, 553, 84 L.Ed. 796 (1940).

The full termination of the A & B Plan and the fulfillment of its purpose by payment of accrued benefits to participants do not constitute a revocation of the Plan or of any of Gulf's contributions to the Plan. When all liabilities are satisfied, the Plan may terminate, and surplus assets revert to Chevron, without causing a revocation of the Plan.

Because defendants, through the merger, have not caused a revocation of the A & B Plan, the "irrevocable"

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[21] This section, entitled "Revocable Trusts," provides:

> "Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested ... in the grantor ... then the income of such part of the trust shall be included in computing the net income of the grantor." 53 Stat. § 166 (1939).

provision does not determine whether the Plan allowed employer reversion of surplus assets.

3. *Exclusive benefit clause*

Plaintiffs claim that the A & B Plan could not provide for employer reversion of surplus assets because Gulf's contributions to the plan were to be used for the "exclusive benefit" of the plan participants and their beneficiaries. Their argument fails to recognize, however, that the "exclusive benefit" requirements of tax law and ERISA are counterbalanced by provisions allowing employer recapture of surplus assets. Both tax law and ERISA require the funds of a pension plan be used "for the exclusive benefit of" the plan participants. 26 U.S.C. § 401(a)(2); 29 U.S.C. § 1103(c)(1) ("for the exclusive purposes of providing benefits ... and defraying ... expenses"). Plaintiffs ignore the fact that both ERISA and the Internal Revenue Code also contemplate employer reversion. The ERISA "exclusive benefit" provision is expressly made subject to the exception that when the plan finally terminates, surplus assets may revert to the employer if three conditions are then met, including that the plan provide for such a distribution. 29 U.S.C. § 1344(d)(1). The "exclusive benefit" provision of Section 165 of the 1939 Revenue Code, quoted above, the law in effect in 1944 when the A & B Plan was established, provided that a plan would be tax exempt if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be used for purposes other than for the exclusive benefit of the participants or their beneficiaries.[22]

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[22] Treasury Regulations in force when the A & B Plan was adopted explain the "exclusive benefit" requirement of section 165 of the 1939 Code:

Internal Revenue Code, 53 Stat. § 165(2) (1939). The Treasury Regulations originally promulgated for section 165(a), which continue in effect without presently relevant substantive change, make clear that, notwithstanding the "exclusive benefit" phrase, the "prior to" language of that section permits the employer to recover surplus assets upon termination of the plan if those assets stem from actuarial error. *See* notes 19 & 22, *supra*.

Because both the Tax Code and ERISA require exclusive benefit language and contemplate that an employer may recover surplus assets after all plan liabilities are

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"Under section 165(a)(2) a trust is not exempt unless under the trust instrument it is impossible ... for any part of the trust corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. As used in section 165(a)(2), the phrase 'if under the trust instrument it is impossible' means that the trust instrument must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. It is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, but it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries." Treasury Regulation § 29.165-2(a) (1942); 26 C.F.R. § 29.165-2(a) (1944 Cumulative Supplement at 6368) (emphasis added).

This regulation continues in effect today without presently relevant substantive change. 26 C.F.R. § 1.401-2(a)(1) & (2).

satisfied, the mere existence of the exclusive benefit provision in the A & B Plan cannot prohibit reversion to an employer.

Courts construing pension plans containing this "exclusive benefit" language follow the rule that the phrase does not prohibit reversion of surplus assets to the employer upon termination of the plan. *See, e.g., Chait v. Bernstein*, 835 F.2d 1017, 1023 (3rd Cir.1987) ("Thus, the text of ERISA itself demonstrates that the 'exclusive benefit' language of ERISA § 403 is not at odds with reversion of the surplus of a single employer plan under § 4044(d)(1)(C)"); *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 555 F.Supp. 257, 261 (D.D.C.1983) ("section 4044(d)(1) of [ERISA] provides that an employer may retain a plan's surplus without running afoul of the exclusive benefit rule"), *aff'd mem.*, 729 F.2d 863 (D.C.Cir.1984); *In re C.D. Moyer Co. Trust Fund*, 441 F.Supp. 1128, 1132 (E.D.Pa.1977), *aff'd* without published opinion, 582 F.2d 1273 (3d Cir.1978). The use of the "exclusive benefit" language in the A & B Plan does not preclude reversion of surplus assets to Gulf.

B. Prohibition of Amendments Decreasing Employee Rights

Plaintiffs extend their argument that the A & B Plan did not allow reversion of surplus assets to the employer,

claiming that the language of the Plan also prohibited amendments creating a right of reversion in the employer.[23]

The amendment provision of the A & B Plan stated as follows:

> "The Board of Directors reserves the right at any time and from time to time to modify or to amend, in whole or in part, any or all of the provisions of the Plan, provided that:
>
> > "(a) No modification or amendment may be made which will deprive any person of any benefit under the Plan which has accrued on or prior to the time of such modification or amendment, and
> >
> > "(b) No such modification or amendment shall make it possible for any part of the Trust Fund to be used for, or diverted to, purposes other than for the exclusive benefit of participants and retired participants, or their

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[23] Plaintiffs further assert, in the alternative, that even if the terms of the Plan did allow a reversionary amendment, the amendment of the Gulf Plan at the time of the merger resulting in the Chevron Plan (with its express reversion provision) was ineffective because it occurred after the partial termination of the A & B Plan. We reject this contention for the reasons previously stated.

beneficiaries under the Plan."
(Emphasis added.)

Other courts have held that "exclusive benefit" language in a plan does not, by itself, prevent an employer from amending a plan to allow reversion of surplus assets. In *Chait*, although the plan contained a provision similar to that in the Gulf Plan, the Third Circuit determined that the language of the plan did not prohibit a reversionary amendment. *Chait*, 835 F.2d at 1022-26.[24] The court held that "a vested employee who has fully received his vested benefits cannot rely on the 'exclusive benefit' language, standing alone, to prevent an amendment reverting surplus plan assets" to the employer. *Id.* at 1018. *See also Outzen v. Federal Deposit Ins. Corp.*, 948 F.2d at 1186, 1187 (allowing reversion amendment despite exclusive benefit language, stating "[t]he cases which allow reversion as well as those which preclude it all dictate that strong, express prohibitory language is necessary to block employer recapture of surplus pension funds in a defined benefit plan"); *Wilson v. Bluefield Supply Co.*, 819 F.2d at 461-465 (allowing reversion of surplus assets despite "exclusive benefit" language in plan); *Washington-Baltimore Newspaper Guild Local 35*, 555 F.Supp. at 260-262; *In re C.D. Moyer Co. Trust Fund*, 441 F.Supp. at 1131-32.

Thus, a defined benefit plan must generally contain language other than the "exclusive benefit" phrase in order

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[24] The plan involved in *Chait* stated:

> "no [amendment to the plan by the employer] shall authorize or permit any part of the funds held under the Plan to be used for or diverted to, purposes other than for the exclusive benefit of the Employees." *Chait*, 835 F.2d at 1022 (footnote omitted).

to preclude an amendment providing for employer reversion. For example, in *Bryant v. Int'l Fruit Products Co., Inc.*, 793 F.2d 118, 123 (6th Cir.), *cert. denied*, 479 U.S. 986, 107 S.Ct. 576, 93 L.Ed.2d 579 (1986), the Sixth Circuit held that an amendment to a defined benefit plan purporting to allow employer reversion was ineffective in light of strong plan language expressly prohibiting such an amendment. The plan contained, in addition to the standard "exclusive benefit" phrase limiting amendment, the phrase "[i]n no event and under no circumstances shall any contributions to this Trust by the Employer, nor any of the Trust Estate or the income therefrom, revert to or be repaid to the Employer." *Bryant*, 793 F.2d at 120 (quoting agreement) (emphasis added). The court found this language to be a unique, "unequivocal" prohibition against employer recapture of any contributions to the plan. *Id.* at 123. Language in the handbook distributed to plan participants supported the *Bryant* court's conclusion:

> "Funds paid into the trust can never be refunded to the Company and are for the exclusive benefit of the employees under the Trust.... It is definitely provided that the funds paid into the Trust are for your exclusive benefit and can never, under any circumstances, revert to the Company." *Id.* (quoting handbook) (emphasis added).

We conclude that the language of the A & B Plan prohibiting amendments other than for the exclusive benefit of the participants does not, by itself, preclude an amendment expressly allowing reversion to the employer.

Furthermore, as discussed above, the language of the Plan impliedly allowed such a reversion.[25]

The policies underlying ERISA support our conclusion.

> "Employers will continue to fund their plans under ERISA guidelines, but will not be penalized for overfunding in 'an abundance of caution' or as a result of a miscalculation on the part of an actuary. Thus, employees will continue to be protected to the extent of their specific benefits, but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis." *In re C.D.*

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[25] Plaintiffs also rely on the summary plan description of the A & B Plan, required by ERISA section 102(a), 29 U.S.C. s 1022(a), for support of their claim that the plan did not allow employer reversion and could not be amended to provide therefor. Our court has ruled that the summary plan description controls if a pension plan is ambiguous. *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir.1991) ("hold[ing] that the summary plan description is binding, and that if there is a conflict between the summary plan description and the terms of the [plan], the summary plan description shall govern").

We do not consider the language of the A & B Plan to be ambiguous, nor do we find any conflict between its terms and those of the summary plan descriptions. Indeed, the summary descriptions of the A & B Plan, in the portions concerning changes to the plan, track the language of the Plan itself, providing that Gulf had the right to change the plan, but that it could not "make any change that would allow the assets of the Plan to be used for anything but the exclusive benefit of members or their beneficiaries...."

Moyer Co. Trust Fund, 441 F.Supp. at 1132-33.[26]

Plaintiffs have received their expected benefits. An award of surplus assets, in light of Plan provisions inferentially and now expressly allowing employer reversion, would result in a windfall to the plaintiffs and would encourage defendants to fund the Chevron Plan more cautiously, to the potential detriment of present and future participants and their beneficiaries.

III. Alleged Chevron Misrepresentations Concerning Reserve for Gulf Plan

During the merger negotiations, Chevron's chairman stated in a letter to Gulf's chairman that, if Chevron decided to combine the pension plans upon merger of the companies, Chevron would set aside assets of the Gulf Plan to provide sufficient reserves for then-existing retiree pensions. Chevron repeated that statement orally and in writing in response to inquiries from persons concerned about the effects of the merger. In their complaint, plaintiffs alleged that Chevron failed to set aside the promised reserves and thus had breached its duty of loyalty under ERISA § 404(a).[27] 29 U.S.C. § 1104(a). The district court held that this claim was not actionable under ERISA because

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[26] This language from *In re C.D. Moyer Co. Trust Fund* was also quoted with approval in *Washington-Baltimore Newspaper Guild Local 35*, 555 F.Supp. at 260.

[27] According to the district court's opinion, no specific reserves were established. Plaintiffs' own expert testified, however, that the merged Chevron Plan had surplus assets in excess of accrued benefits of more than $800 million which would not be depleted below the full funding limit for a considerable time. *In re Gulf Pension Litigation*, 764 F.Supp. at 1213.

plaintiffs' claims did not arise out of an ERISA plan. In addition, the court ruled that plaintiffs stated no claim under common law.

The district court determined, and plaintiffs concede, that Chevron's promises were not contained in a written plan document as required by section 402(a)(1) of ERISA. 29 U.S.C. § 1102(a)(1). That Chevron's statements were made in writing is irrelevant as they do not profess to be plan amendments. ERISA requires that a plan under its auspices "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3).

Our court has held that an oral agreement cannot sustain a cause of action under ERISA. *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir.1989). *See also Rodrigue v. Western and Southern Life Ins. Co.*, 948 F.2d 969, 971-72 (5th Cir.1991) (holding plaintiff precluded from arguing that employer was estopped from denying coverage based on oral modifications to plan); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir.1989) (ERISA precludes oral modifications to plan and as well as claims of promissory estoppel in suit seeking to enforce rights to pension benefits). This reasoning extends to written modifications or promises which are not, and do not purport to be, formal amendments of a plan following the procedures required by section 1102(b)(3). *See Alday v. Container Corp. of America*, 906 F.2d 660, 665-66 (11th Cir.1990) (holding that booklet summarizing benefits and pre-retirement letters were insufficiently formal writings and did not amend ERISA plan; interpreting 29 U.S.C. § 1102(b)(3) to prohibit modification of plan by informal written agreement), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991). Chevron's statements did not purport to be part of, or an amendment to, either company's pension plan, nor is

there any evidence that either Chevron or Gulf attempted to amend either plan to include the promises. Chevron's statements, therefore, are not part of any ERISA plan.[28]

In any event, the district court determined, and plaintiffs do not here challenge, that plaintiffs did not establish that they relied to their detriment on Chevron's promises and, even if they had so relied, that they suffered any injury as a result of any such reliance. Indeed, it is undisputed that the current reserves of the Chevron Plan are more than sufficient, without any additional contributions, to cover the benefits of both existing and future Gulf retirees for a significant time to come. The district court did not err in holding that plaintiffs' claims for misrepresentation and breach of ERISA's duty of loyalty were not actionable under ERISA or the common law.

IV. Seventh Amendment Right to Jury

Finally, plaintiffs challenge the district court's order granting Chevron's motion to strike their jury demand. They argue that several of their claims, particularly the claim for distribution of surplus assets, seek a money judgment and thus are legal in nature so as to entitle them to a jury trial.

"To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought." *Chauffeurs, Teamsters, and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565,

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[28] Moreover, Chevron's statements were not shown to be made in its fiduciary capacity, as opposed to being statements of intended action in its corporate nonfiduciary capacity as plan sponsor or settlor. *See, e.g., Malia*, 23 F.3d at 833; *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir.1994); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470-71 (11th Cir.1986).

110 S.Ct. 1339, 1345, 108 L.Ed.2d 519 (1990). This analysis consists of two inquiries: (1) a comparison of the present statutory action to 18th- century actions in the courts of England before the merger of the courts of law and equity; and (2) an examination of the relief sought to determine whether it is legal or equitable in nature. *Id.* Of the two, the latter inquiry bears more weight. *Id.*

Here, the first inquiry is relatively simple, as ERISA law is closely analogous to the law of trusts, an area within the exclusive jurisdiction of the courts of equity. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 954, 103 L.Ed.2d 80 (1989) ("ERISA abounds with the language and terminology of trust law. ERISA's legislative history confirms that the Act's fiduciary responsibility provisions 'codif[y] and make[ ] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts' ") (internal citations omitted; brackets in original). We have held, as have the majority of the other circuits, that ERISA claims do not entitle a plaintiff to a jury trial. *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir.1980) (inquiry into whether plan administrators acted arbitrarily and capriciously is action usually performed by judges). *See also Kirk v. Provident Life and Accident Ins. Co.*, 942 F.2d 504, 506 (8th Cir.1991) (summarily rejecting jury trial argument); *Blake v. Unionmutual Stock Life Ins. Co.*, 906 F.2d 1525, 1526 (11th Cir.1990) (claim for money damages was in effect claim for benefits plaintiffs were allegedly entitled to under the plan, which is "traditionally equitable relief").

The second inquiry, although not as clear cut, also persuades us that plaintiffs' claims sound in equity. Some relief sought by plaintiffs is clearly equitable: they sought specific performance as a remedy to cure the alleged

breaches of the duty of loyalty stemming from Chevron's promises to set aside reserves for Gulf Plan participants.

Plaintiffs' requests for monetary recovery on other claims, traditionally the form of relief offered in courts of law, do not mandate a conclusion that their action is legal in nature. *Calamia*, 632 F.2d at 1236-1237 ("The mere fact that the appellant would receive a monetary award if he prevailed does not compel the conclusion that he is entitled to a jury trial"). The Supreme Court has recognized two exceptions to the general rule that a claim seeking monetary recovery is legal in nature. In *Terry*, the Court made clear that a request for monetary recovery sounds in equity, and thus does not guarantee a jury trial, when it is restitutionary in nature or is intertwined with claims for injunctive relief. *Terry*, 494 U.S. at 570-71, 110 S.Ct. at 1348. The first exception is particularly relevant in this case. Plaintiffs' request for distribution of surplus assets is analogous to an action for disgorgement of improper profits. In this claim, as well as in the now settled claims for breach of fiduciary duty, plaintiffs seek restitution of money allegedly wrongly held by the defendants.

We hold that plaintiffs' claim is equitable in nature. The district court did not err in striking plaintiffs' demand for a jury.[29]

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[29] Our conclusion is supported by the posture the case is now in, following the settlement of most issues. Further, no issues of fact remain to be decided by a jury.

Conclusion

We conclude that under the circumstances here the partial termination found by the district court of the A & B Plan, an entirely employer funded defined benefit pension plan, neither bestowed on plaintiffs any right to plan assets which were then surplus (after providing for all accrued benefits as required by § 411(d)(3)) nor precluded subsequent plan amendment to expressly provide that at final plan termination then surplus plan assets would revert to the employer. We further hold that the A & B Plan prior to the 1986 merger at least implied that at final plan termination surplus assets would revert to the employer, and that the plan amendment on merger expressly providing for such reversion was authorized by, and not contrary to, the terms of the plan and was consistent with law. Accordingly, we AFFIRM the district court's determination that the plaintiffs are not entitled to surplus assets of the A & B Plan. In addition, we AFFIRM the district court's rulings that plaintiffs' misrepresentation claims against Chevron were not actionable and that plaintiffs were not entitled to a jury trial. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

No. 91-2747

DEAN BORST, ET AL.,
Plaintiffs-Appellants,
CHEVRON CORP., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 10/21/94, 5 Cir., , F.3d)

(December 1, 1994)

Before POLITZ, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local

Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/
WILL GARWOOD
United States Circuit Judge

Judges King, Smith, Duhé and Emilio M. Garza did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX C

In re GULF PENSION LITIGATION.
Civ. A. No. 86-4365.
United States District Court,
S.D. Texas,
Houston Division.
April 10, 1991.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:

	§	CIVIL ACTION NO. 86-4365
GULF PENSION	§	(Consolidated Class Action)
LITIGATIONS	§	

OPINION

I. INTRODUCTION

This is a consolidated class action brought by more than 40,000 former participants in the Pension Plan of Gulf Oil Corporation. Defendants are Chevron Corporation, Gulf Oil Corporation, the Chevron Corporation Retirement Plan, the Pension Plan of Gulf Oil Corporation, the Benefits Committee of the Pension Plan of Gulf Oil Corporation and each of its members, and the Pension Committee of the Pension Plan of Gulf Oil Corporation and each of its members.

To understand the case some appreciation of the demise of Gulf Oil Corporation is necessary. On January 1, 1982, Gulf had 29,706 employees covered under the Gulf Pension Plan and was one of the largest integrated oil companies in the United States. Concerned that Gulf's share price did not reflect its true value, Gulf's management began a plan to streamline the company that included substantial reductions in the number of employees. By the end of 1983 Gulf had reduced its work force to 23,054 active Gulf Plan participants, but its share price had still not risen substantially. In January of 1984 Gulf management learned that a hostile tender offer was imminent from a group led by T. Boone Pickens. Gulf sought to interest

several other large oil companies, including Chevron Corporation, in a friendly merger to avoid the Pickens' takeover attempt.

In February of 1984 Gulf and Chevron announced a merger, and a merger agreement was signed in March of 1984. For the next year the companies operated independently under a standstill agreement while Gulf divested itself of certain assets required by the FTC and a number of combined Gulf-Chevron working groups determined how to integrate the two companies and their pension and other employee benefit plans. Because Gulf and Chevron were in the same business it became apparent that a number of employees would be redundant in the merged company. Chevron also decided to sell parts of Gulf to help pay the debt it had incurred in making the acquisition. By July 1, 1986, when the Gulf Pension Plan and the Chevron Annuity Plan were merged into the Chevron Retirement Plan, 13,545 former Gulf Pension Plan participants remained on Chevron's payroll. All of the Gulf employees who left between January 1, 1982, and June 30, 1986, were covered by Gulf employee benefit programs, including pension plans. This action was filed by plaintiffs, Dean Borst, et al., in November 1986. In April of 1987, plaintiffs, Harry Back, et al., filed a similar action in the United States District Court for the Western District of Pennsylvania. On the motion of the defendants, the Back action was transferred to this Court and consolidated with the Borst action. The Court preliminarily certified the case as a class action on November 9, 1987, and appointed the individual plaintiffs as class representatives. After several hearings, on February 26, 1990, the Court certified the consolidated action under Fed.R.Civ.P. 23(b)(2) and defined the main class as

(1) All participants in the Pension Plan of Gulf Oil Corporation or any predecessor plan (sometimes abbreviated as the "Gulf Plan" or "Plan") who

terminated employment for any reason after December 31, 1981, and before July 1, 1986, with Gulf Oil Corporation or its successors or affiliates, or any subsidiaries that had adopted the Gulf Plan ("Gulf").

(2) All Gulf Plan participants who were accruing benefits under the Gulf Plan as of June 30, 1986.

(3) All Gulf Plan participants who terminated Gulf employment prior to January 1, 1982, and who were receiving a pension or entitled to an immediate or deferred pension or a refund of accumulated employee contributions under the Gulf Plan as of June 30, 1986.

(4) All Gulf Plan participants who terminated employment with Gulf prior to January 1, 1982, and after December 31, 1975, who were not entitled to any pension benefit under the Gulf Plan at the time of such termination (other than a refund of accumulated employee contributions) but who, if they had been reemployed by Gulf as of June 30, 1986, would have been entitled under the ERISA break-in-service rules to credit for prior service under the Gulf Plan.

(5) All spouses, joint annuitants, or other plan beneficiaries of any deceased Gulf Plan participants described in the foregoing categories.

(6) All alternate payees under qualified domestic relations orders of separated or divorced Gulf Plan participants described in the foregoing categories.

The Court also certified a divestiture sub-class defined as

> All members of the main class who were offered employment by any of the following purchasers of assets applicable to the operation in which they were employed by Gulf: Sohio/BP ("Sohio"), Cumberland Farms, Champion Energy, or Thermex.

On January 4, 1990, the Court granted defendants' motion to strike plaintiffs' request for a jury trial, and granted defendants' motion to dismiss most of plaintiffs' common law claims as preempted by the Employee Retirement Income Security Act of 1974, 88 Stat. 829, as amended, 29 U.S.C. §§ 1001, et seq. ("ERISA"). The parties agree that the Court has jurisdiction over the remaining claims pursuant to § 502(e) and (f) of ERISA, 29 U.S.C. § 1132(e) and (f).

Plaintiffs went to trial seeking relief under ERISA and the language of various benefit plans for four types of wrongs allegedly committed by defendants. First, plaintiffs claimed that defendants' actions resulted in a partial termination of the Gulf Pension Plan and its predecessor plans that entitled plaintiffs to relief provided by ERISA and the Plan. Alternatively, plaintiffs claimed that two of the plans had served their purposes and their trusts should be terminated as "wasting trusts" under common law. Second, former Gulf employees who were transferred to Sohio, Cumberland Farms, and Champion Energy as a part of divestitures of former Gulf operations in 1985 and 1986 sought early retirement benefits under the Gulf Pension Plan. Third, former Gulf employees who were transferred to Champion Energy, Cumberland Farms, and Thermex incident to divestitures sought benefits under a severance plan that existed from February 1, 1984, to February 1, 1986 (Plan 728). Finally, plaintiffs sought damages for a

number of alleged breaches of fiduciary duty during the corporate merger and the integration of the two pension plans.

On November 8, 1990, after hearing 16 days of testimony, the Court ordered the attorneys in charge for the class and defendants and the CEO of Chevron to meet and determine if some or all of the claims could be settled. The following week the parties announced a proposed settlement of the plaintiffs' claims for early retirement benefits and severance benefits under Plan 728. As part of the settlement Chevron also agreed to vest in their accrued benefits under the Gulf Pension Plan all members of the class whose employment with Gulf was terminated between January 1, 1984, and June 30, 1986, without a vested pension benefit, and plaintiffs agreed to dismiss the partial termination claims of former Gulf employees who were terminated between January 1, 1982, and December 31, 1983. After notice to the class, the Court held a hearing on the partial settlement on January 25, 1991, and approved it. The Court will now address the plaintiffs' remaining claims.

II. PARTIAL TERMINATION CLAIMS

A. General

An understanding of the partial termination claims requires an appreciation of some basic features of pension plans. An employee normally does not have an unconditional right to benefits provided by a defined pension benefit plan[1] until the employee has worked for the employer for some number of

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[1] Unlike a defined contribution plan, under which the benefits an employee receives are contingent upon the funds contributed and the investment return on plan assets, in a defined benefit plan the plan itself defines the benefits to be paid. If the employer's contribution and investment return are inadequate to fund those benefits, normally the employer must make additional contributions to the plan.

years, as determined by the plan. If the employee ends his employment before he completes this period, he forfeits his right to pension plan benefits. If he meets the plan's time-in-employment criteria, he becomes vested with the right to receive some minimum pension benefit, as defined by the plan, even if he should later end his employment.

An employer makes contributions to a defined benefit pension plan based on its estimate of the amount of money needed by the plan to pay for current and future liabilities. For a number of reasons, a plan can achieve a surplus over what is needed to fund current and future liabilities. If a surplus is created and the plan terminates, i.e., ceases to exist, the surplus may revert to the employer if allowed by the plan.

One of the benefits an employer receives by making contributions to a qualified ERISA pension plan is the right to deduct contributions to the plan for federal income tax purposes.[2] As a condition for this favorable tax status, § 401(a)(7) of the Internal Revenue Code (the "Code") provides that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part satisfies the requirements of § 411 (relating to minimum vesting standards)." Section 411(d)(3) of the Code, which was added by ERISA, requires that all qualified plans must provide for vesting (i.e., non-forfeitability) of benefits of employees affected by a plan termination or a partial plan termination.[3] The purpose of

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[2] The Gulf Pension Plan and Chevron Retirement Plan were intended to be ERISA qualified defined benefit pension plans.

[3] This statute states:

> (3) **Termination or partial termination; discontinuance of contributions.**

Code § 411(d)(3) is to prevent the forfeiture of terminated employees' benefits that have not yet vested and to prevent an employer from reaping a windfall by "mak[ing] deductible contributions on which he would enjoy a tax-free buildup of income, then terminate the plan and have all amounts revert back to him." Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154, 160 (1984); see United Steelworkers of America v. Harris & Sons Steel Co., 706 F.2d 1289, 1298 (3d Cir.1983).

Unlike a complete termination, a plan continues after a partial termination. The genesis of the partial termination concept was apparently a 1954 article by the IRS's chief pension expert, Isidore Goodman, who explained that "[a]t times, it is easier to devour an object with several bites than it is to attempt to swallow it in one gulp. So it is with a plan which is chopped down little by little until it becomes merely an empty shell." 32 TAXES 48, 53 (January 1954). Two kinds of plan-related activities can result in a partial termination: (1) The number of participants can be reduced, thereby causing the number of non-vested employees who forfeit their pension benefits to be greater than would otherwise be anticipated under actuarial formulas, or (2) future benefit accruals can be reduced, thereby increasing the potential for a

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> Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that--
>
> (A) upon its termination or partial termination,
>
> * * *
>
> the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

reversion of plan assets to the employer upon termination of the plan. Commentators have referred to these two scenarios as "vertical" and "horizontal" partial terminations. Stuart M. Lewis, Partial Terminations of Qualified Retirement Plans--An Evolving Doctrine, 13 COMP. PLAN J. (BNA) 223 (1985).

This case involves claims that both types of partial terminations occurred. Even though Chevron agreed, as part of the partial settlement, to vest all plaintiffs who were terminated during the period when plaintiffs now allege that a vertical partial termination occurred (January 1, 1984, through June 30, 1986), the Court must nevertheless address plaintiffs' partial termination claims because the remedy for a horizontal partial termination is to vest class members who were employed on July 1, 1986, the date of that alleged partial termination, and because plaintiffs seek relief in addition to vesting if they are successful on their vertical or horizontal partial termination claims.

Although an employer may declare whether a partial termination has occurred, that determination is accorded no deference by a court; the question is one of law for the court to decide de novo. Anderson v. Emergency Medicine Associates, 860 F.2d 987, 990 (10th Cir. 1988). Neither ERISA nor the Internal Revenue Code defines a partial termination. Aside from case law, most of the authority addressing this question is found in Treasury Regulations, IRS revenue rulings, and the IRS Plan Termination Handbook.[4] These sources offer analytical guidelines, but again do not define a partial termination. Although decisions affecting

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[4] Although IRS revenue rulings are generally entitled to deference by a court, the Plan Termination Handbook is of lesser stature. The Court views it as a useful guide to be followed when its meaning is clear and consistent with more persuasive authority and with the underlying purposes sought to be achieved by the partial termination rules.

pension plans must conform to a vast array of detailed statutory and regulatory mandates, no precise guidance is provided on whether a change in plan members or benefits results in a partial termination. Instead, these questions are to be answered by a case-specific factual analysis. See Treas. Reg. § 1.411(d)-2(b)(1) (1977).

B. Vertical Partial Termination

The vertical partial termination rule is found within the "facts and circumstances" test of Treas. Reg. § 1.411(d)-2(b)(1).

> General rule. Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan . . . . (emphasis added)

Perhaps because this rule gives so little guidance, it has spawned a number of complex issues, few of which have been resolved by controlling authority in this Circuit, and most of which are present in this case. Before addressing the issues, the Court will first describe them.

1. Significant Number or Percent

IRS revenue rulings suggest that an employer-initiated permanent reduction of either a significant number or a significant percent of employees from a plan as part of a major corporate event may constitute a partial termination. Rev. Rul.

81-27, 1981-1 C.B. 228 (termination of 95 of 165 employees in connection with the closing of one of two divisions was a significant number that resulted in a partial termination); Rev. Rul. 73-284, 1973-2 C.B. 139 (when 12 of the 15 employees (80%) covered by a qualified plan declined to transfer to a new location and were terminated, a partial termination occurred because a significant percent of the employees were excluded from participating in the plan); Rev. Rul. 72-439, 1972-2 C.B. 223 (the significant percent test was met when 120 of the plan's 170 participants (71%) became ineligible to participate in future employer contributions). Although courts have given lip service to the significant number test, they have been reluctant to use this test as a basis for holding that a partial termination has or has not occurred. See Tipton, 83 T.C. at 160 n. 5 ("[Since 34% and 51% are significant,] [w]e need not and do not decide whether a partial termination would occur where a significant number of participants but not a significant percent, are excluded from participation in a plan."); Ehm v. Phillips Petroleum Co., 583 F. Supp. 1113, 1115-16 (D. Kan. 1984) (since 415 terminated employees comprised only 2.5% of the plan participants, the court found no partial termination under the significant percent test and declined to apply the significant number test). No court has found a partial termination under the significant number test.

In this case plaintiffs argue that the loss of approximately 10,000 Gulf Plan participants between January 1, 1984, and June 30, 1986, satisfies both the significant percent and the significant number tests. Plaintiffs concede that the only reported instance in which the significant number test has been used to find a partial termination involved the discontinuance of an employer's business at a particular location with attendant

layoffs. Rev. Rul. 81-27, 1981-1 C.B. 228.[5] Neither the Court nor the parties have uncovered any instance in which the significant number test has been applied to a case such as the present one in which a large number of company-wide terminations is alleged to have resulted in a partial termination.[6]

2. What Number or Percent is Significant?

Problems arise in applying the significant number and the significant percent tests when the facts are not as manifest as those in the cases and revenue rulings cited above. The Internal Revenue Service has stated, and some courts have found persuasive, that an employer-initiated turnover rate in excess of 20% of a plan's participants might be significant if it is coupled with other factors, such as the closing of a plant or division. These authorities state that termination of a lesser percent of plan participants, especially on a company-wide basis, could only be significant if the plaintiffs present evidence of egregious factors such as evasion of pension obligations or prohibited discrimination in favor of highly compensated employees. See Weil v. Retirement Plan Administrative Committee of the Terson Co., 913 F.2d 1045, 1052 (2d Cir. 1990) ("Weil II");

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[5] Although a number of Gulf operations, including its Pittsburgh headquarters, were closed because of the merger, plaintiffs do not argue that the layoffs resulting from those closures should be evaluated separately to determine if a vertical partial termination occurred under either the significant number or significant percent test.

[6] In Weil v. Retirement Plan Administrative Committee for the Terson Co., 750 F.2d 10, 12 (2d Cir.1984) ("Weil I"), the Court stated that termination of a significant number of employees in connection with a company-wide reorganization plan event could constitute a partial termination. However, on remand the district court applied only the significant percent test.

Plan Termination Handbook §§ 252(8), 252(9)(d) and 252(10).[7]

3. How is the Number or Percent Calculated?

The significant percent and significant number analyses in this case are further complicated by disagreements concerning:

1. whether terminated vested as well as non-vested employees should be considered in calculating the percent and number;

2. whether employees who transferred to a successor employer, and whose accrued pension benefits were transferred to a successor plan, should be counted;

3. whether defendants should be entitled to exclude from the number of terminations normal turnovers, what turnovers are "normal," and who has the burden of proof of establishing the normal turnover rate; and

4. whether the percent and number of terminations should be calculated on an annual basis, as defendants argue, or whether the percent and number of terminations occurring from a significant corporate event over a two-and-one-half-year period will satisfy the tests, as plaintiffs argue.

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[7] Although an employer's bad motive can lower the percent required, a benign motive will not preclude a finding of a partial termination. In Tipton, 83 T.C. at 160, the Court held that reductions in plan participation of 34% and 51% in consecutive years constituted a partial termination even though the reductions were caused by adverse business conditions beyond the employer's control.

Because the number and percent of terminated Gulf employees must first be quantified before their significance can be judged, the Court will address these issues first.

a. Vested or Non-Vested Terminations

Many of the former Gulf employees who were terminated between January 1, 1984, and June 30, 1986, were vested under the Gulf Pension Plan.[8] Defendants argue that these employees should not be considered in calculating either the percent or number of terminations. The partial termination rule is designed to prevent forfeiture of pension benefits that have not yet vested and to prevent a windfall to the employer through a reversion of money on which the employer has paid no federal income taxes. Including vested terminees does not further the first policy since they forfeit no benefits. Furthermore, Congress has taken a more direct approach to remedy the potential for a tax-free corporate windfall. When a pension plan is terminated, any assets that revert to the employer are not only included in the employer's gross income, they are also subject to an additional excise tax. The Revenue Reconciliation Act of 1990 raised the excise tax on employer reversions from 15% to 20% and imposed a 50% excise tax unless the employer transfers part of the reversion to a replacement plan or provides more favorable benefits.[9] The Court therefore concludes that in applying both the significant percent and the significant number tests, only non-vested

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[8] According to Defendants' Ex. 332, there were 263 vested terminations in 1984, 1,372 in 1985, and 472 in the first six months of 1986.

[9] Pub.L. No. 101-508 ss 12001 and 12002 (Nov. 5, 1990); to be codified as 26 U.S.C. § 4980(a) and (d).

terminations are relevant.[10] However, out of an abundance of caution, the Court has calculated terminations both with and without vested terminees and concludes that the differences in percentages and numbers of terminations are not significant enough to affect the outcome of the vertical partial termination claim.

b. Employees Who Transferred to a Successor Plan

In 1985 Gulf sold certain refining and marketing facilities to Sohio, and Chevron sold the merged company's Northeast and Ohio marketing assets to Cumberland Farms. In both divestitures the asset purchase agreements obligated the buyers to establish defined benefit pension plans with terms substantially similar to those of the Gulf Pension Plan. Incident to both divestitures Gulf and Chevron agreed to transfer pension assets in amounts at least equal to the accrued benefits of the transferring employees. Defendants argue that former Gulf employees who transferred to Sohio and Cumberland Farms should not be included as terminees for purposes of the vertical partial termination analysis.

In Morales v. Pan American Life Ins. Co., 718 F. Supp. 1297, 1302 (E.D. La. 1989), aff'd, 914 F.2d 83 (5th Cir. 1990), the employer, PALIC, closed its Medicare Division on

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[10] Prior case law and revenue rulings that arguably address this issue are analyzed in Weil II, 913 F.2d at 1050-51. In its amicus brief to the Second Circuit urging rehearing in Weil II, the government, inter alia, criticized the Second Circuit for "comparing apples and oranges" in its calculation of the relevant percent by excluding non-vested terminees from the numerator while continuing to include them in the denominator. The Court agrees that including vested terminees only in the denominator results in an artificially low percentage, and for purposes of the significant percent inquiry the Court will exclude vested Gulf Plan terminees from both the numerator and the denominator.

December 31, 1984. During the preceding months PALIC transferred 30 of the 159 Medicare Division employees to other jobs in PALIC. In calculating the percentage of employees who were involuntarily terminated, the Court held that "[t]he transferred employees should not be included with the number of employees involuntarily terminated as they remained PALIC employees and Plan participants . . ." The Court is persuaded that the reasoning of Morales is also applicable to this case.

Although the Sohio and Cumberland Farms transferees did not remain Gulf employees or members of the Gulf Pension Plan, assets from the Gulf Pension Plan sufficient to cover all of the transferred employees' accrued benefits under the Gulf Plan were transferred to the Sohio and Cumberland Farms' plans. For the reasons discussed above in connection with the vested, non-vested issue, neither of the policies underlying the partial termination rule would be served by including these employees as "affected employees" for purposes of determining whether a vertical partial termination occurred. In fact, to count such employees could deter employers from taking steps to protect employees in similar situations by potentially penalizing an employer whose terminated employees transfer to a successor employer that is obligated to continue the same or similar benefits and to whom plan assets have been transferred. The Court does not believe that either Congress or the IRS intended such a result. Cf. IRS Gen. Couns. Mem. 39,824 (August 27, 1990).

c. Turnover Rate

Since one of the purposes of the partial termination rule is to deter employers from terminating non-vested employees, it is generally agreed that in calculating the number or percentage reduction of plan members, only involuntary, employer-initiated, terminations should be considered. E.g., Anderson, 860 F.2d at 990. In cases involving relatively few

employees it may be possible to resolve this issue by determining the facts surrounding each termination. More often, however, as exemplified by this case, it is not feasible to analyze individual terminations. To address this problem, the IRS Plan Termination Handbook allows an employer to exclude its normal turnover rate in determining whether the reduction in employees is significant. Section 252 provides in part:

> (6) . . . The facts and circumstances must be considered in each case and may include the extent to which terminated employees are replaced, and the normal turnover rate in a base period. The base period ordinarily should be a set of consecutive plan years (at least two) from which the normal turnover rate can be determined, and should reflect a period of normal business operations rather than one of unusual growth or reduction. Generally, the plan years selected should be those immediately preceding the period in question.
>
> (7) The turnover rate is determined by dividing the employer-initiated terminations by the sum of the total participants at the start of the period and the participants added during the period. Employer-initiated terminations are generally all terminations other than those attributable to death, disability retirements and retirement at normal age. In certain situations, the employer may be able to prove that other terminations were also not employer-initiated.

Defendants seek to exclude from consideration those Gulf employees who retired and terminated voluntarily between

January 1, 1984, and June 30, 1986. Since defendants recognize that many of these departures, however labeled in defendants' employment records, may have been prompted by the impending closings or divestitures of Gulf facilities and across-the-board reductions-in- force, defendants have calculated what they contend was Gulf's "normal turnover rate" before the onset of the troubles described at the beginning of this opinion. Using the years 1978-1981 as the base period, Defendants' Ex. 10 purports to calculate a "normal" Gulf turnover rate of 8.59% and a "normal" Gulf retirement rate of 2.43%.

There are several problems with defendants' 8.59% "normal" turnover rate. Although 1978 through 1981 was a period of normal business operations by Gulf, it was also a period when many new employees were hired each year. In contrast, during the period from January 1, 1984, through June 30, 1986, very few new employees were hired by Gulf. From 1978 through 1981 at least 3,500 new employees were hired each year; there were only 1,084 new hires in 1984, 331 in 1985, and 130 during the first six months of 1986. (Defendants' Ex. 11) This distinction lessens the reliability of the 1978-1981 era as a base period. Plaintiffs' actuarial expert, Mr. William A. Dreher, testified that fewer long-term employees are terminated either voluntarily or involuntarily. Thus, when an employer is continuously hiring large numbers of new employees, the turnover rate will be higher than when the work force is contracting. It is therefore not reasonable to assume that the 1978-1981 turnover rate would have continued in the 1984-1986 era.

Plan Termination Handbook § 252(7) and Examination Tip (4)(a) and case law place the burden on the employer to prove that terminations are voluntary. See Morales, 718 F. Supp. at 1302-03. Although defendants tendered a blizzard of numbers, they presented no evidence that the 8.59% normal turnover rate

would have continued in the 1984 through 1986 period. Absent such evidence, and considering the dramatic reduction in new hires and the various programs undertaken by Gulf and Chevron to reduce the work force during this period,[11] the Court concludes that defendants have not proved either that there was a normal turnover rate from 1984 through June of 1986, or that the 8.59% rate urged by defendants represents such a rate.

The Court will, however, exclude from its calculation of affected employees the 2.43% normal retirement rate reflected on Defendants' Ex. 10. Retirement, unlike termination, is not a function of the rate of new hires. Under the Gulf Pension Plan any employee who had 75 points, which generally meant at least 20 years of employment, could retire. Logically, some retirements would have occurred from 1984 through June of 1986 even if Gulf and Chevron had not introduced new initiatives to reduce the size of the work force, and this rate would be unaffected by the low new-hire rate during this period.

The Court is not persuaded by plaintiffs' argument, based on § 252(7) of the Plan Termination Handbook, that only normal retirement at age 65 should be considered. Section 252(7) states that this is the general rule, but permits proof by the employer to the contrary. The evidence showed that Gulf employees could receive non-discounted early retirement at age 60, and that eligible Gulf employees could and did retire before age 60 with reduced benefits long before the Gulf/Chevron merger. However, since retirements were accelerated by the initiatives of Gulf and Chevron to reduce their work force, the Court will also treat the 2.43% normal retirement rate as a ceiling, and retirements in excess of that rate will be considered to be employer-initiated. In calculating the number of affected

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[11] These programs are discussed in part II.B.4., infra.

employees under the significant number and significant percent tests, the Court will exclude for each year a number of employees equal to the lesser of the actual number of retirements or 2.43% of Gulf Plan participants at the end of the year.

d. Time Period

Defendants argue that in determining whether a vertical partial termination occurred the Court should consider only the number of employees excluded within a single plan year. The Court does not find this position to be supported by logic or required by authority. Most reported vertical partial termination rulings and decisions did not involve massive corporate restructuring of the scale implemented by Gulf and Chevron. The facts in those decisions were therefore generally limited to a period of less than a year. There is nothing in the language of the rule itself, however, that requires that a significant corporate event occur within a year, and the ending of a calendar or plan year has no intrinsic relevance in making this evaluation. The IRS guidance found in § 252(7) of the Plan Termination Handbook instructs that "[t]he turnover rate is determined by dividing the employer-initiated terminations by the sum of the total participants at the start of the period and the participants added during the period." (emphasis added) Both the IRS, in its Technical Advice Memorandum Concerning The Employee's Retirement Plan of A&P Company, and the Second Circuit in Weil I, 750 F.2d at 12, have stated that a series of employer-initiated terminations related to the same event may be considered in determining whether a partial termination has occurred even if those terminations occur over a multi-year period. This Court likewise concludes that, assuming plaintiffs can prove it, a vertical partial termination may occur from a significant corporate event that manifests itself in employer-initiated terminations occurring over the two-and- one-half-year period urged by plaintiffs.

e. The Relevant Number and Percent

For purposes of the significant number test, the relevant number of terminations is the total number of plan members terminated, less: (1) those who were already vested, (2) those who voluntarily retired, including both discounted and undiscounted early retirees and disability retirees, (3) those who transferred to the Sohio and Cumberland Farms successor plans, and (4) those who died. To calculate the relevant percent the Court will divide the number obtained by the formula in the previous sentence by the sum of the non- vested plan participants at the start of each period and the non-vested participants added during that period. Application of these formulas to the facts yields the following chart, which the Court finds to be established by the evidence.

	1984	1985	Jan.-June 1986	Total 2.5 Years
Total Terminations[12]	2,623	6,588	1,843	10,947
Deductions:				
(1) vested terminees[13]	263	1,372	472	
(2) retirements[14]	483	531	187	

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[12] Taken from Defendants' Ex. 11.

[13] Taken from Defendants' Ex. 332.

[14] Calculated by multiplying the 2.43% normal retirement rate by the number of all plan participants at the end of the period except for 1984, for which all retirements were deducted since the number was less than 2.43%.

(3) transfers to Sohio & Cumberland Farms[15]	0	967	245	
(4) deaths[12]	52	39	16	
Total Deductions	798	2,909	920	
Total relevant terminations	1,825	3,679	923	6,427
Non-Vested Members at Beginning of period[16]	12,688	11,034	7,520	
New members added[17] 1,545	1,084	331	130	
Total members	13,772	11,365	7,650	14,233
Percentage Decrease 45.2%	13.3%	32.4%	12.1%	

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[15] At a January 3, 1991, hearing, the parties agreed that these were the correct numbers of transferred employees.

[16] These numbers are agreed to by the parties.

[17] Taken from Defendants' Ex. 11. The Court has assumed, and the parties agree, that all new members were non-vested.

Alternatively, calculating the relevant number and percent by including vested plan participants in both the numerator and the denominator, yields the following chart:

	1984	1985	Jan.-June 1986	Total 2.5 Years
Total Terminations	2,623	6,588	1,843	10,947
Deductions:				
(1) retirements	483	531	187	
(2) transfers to Sohio & Cumberland Farms	0	967	245	
(3) deaths	52	39	16	
Total Deductions	535	1,537	448	
Total relevant terminations	2,088	5,051	1,395	8,534
Members at Beginning of period[12]	23,054	21,515	15,258	
New members added	1,084	331	130	1,545
Total members[12]	24,138	21,846	15,388	24,599
Percentage Decrease	13.3%	32.4%	12.1%	45.2%

4. Significant Corporate Event

The parties differ over the number of significant corporate events that occurred between January 1, 1984, and June 30, 1986. Defendants contend that two distinct corporate events occurred during this period: the merger of Gulf and Chevron in 1984 and 1985, and then a drastic decline in oil prices with resulting layoffs, which began in late 1985 and culminated in 1986. Plaintiffs argue, and the Court finds, that the business decisions by Gulf and Chevron to reduce the work force all resulted in a single corporate event throughout this two-and-one-half-year period. After the merger between Gulf and Chevron was announced in February 1984, Chevron and Gulf began a series of actions designed to reduce their partially redundant work force.[18] In March of 1984 Gulf suspended hiring new employees. In May of 1984 Chevron announced and implemented a severance plan for involuntary terminations occurring between April 27, 1984, and April 26, 1986. (Plan 728; Plaintiffs' Ex. 289) Later in 1984 Gulf adopted a three-phase Surplus Manpower Reduction Program to reduce merger-related surplus employees. Under the first phase of the program, announced in November 1984, Gulf offered a Voluntary Termination Incentive Program ("VTIP") to provide

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[18] Although the merger-related terminations did not commence until February, all parties have used January 1, 1984, as the demarcation point between pre-merger terminations initiated by Gulf and merger-related terminations in which Chevron was a motivating force. Defendants have never sought to exclude January of 1984 from their calculations of the relevant numbers and percentages during the 1984-1986 era. (See, e.g., Defendants' Exs. 11, 331, and 332.) Likewise, as part of the partial settlement, defendants have vested employees who were terminated in 1984 before the merger. Since all parties have sanctioned the inclusion of January 1984 terminations, and since the inclusion of these terminations benefits the class, the Court has not disturbed this boundary, albeit somewhat artificial, between the 1982 and 1983 Gulf terminations and the 1984-1986 merger-related terminations.

severance pay to employees working in locations where Chevron and Gulf had identified a surplus in their work forces. Under VTIP employees were required to come forward during November and December 1984 and volunteer to terminate their employment. Gulf and Chevron required these employees to remain on the job, however, until they were finally released, and most actual VTIP terminations did not occur until the end of 1985. In the second phase of the program Gulf employees were offered transfers or demotions, and were paid severance if they chose not to accept. The third phase involved involuntary terminations. By late November of 1985 this three-phase program had resulted in 4,468 terminations: 923 by voluntary severance, 1,486 by "transfer/demote severance," and 2,059 by involuntary severance. (Plaintiffs' Ex. 484 at p. 3)

At the same time, and also as a result of the merger, Chevron began selling off various assets of Gulf and Chevron, both to reduce redundancies and to finance the enormous debt it had incurred to acquire Gulf. These divestitures, which eliminated thousands of additional Gulf employees, included the sale of Gulf's explosives group to Thermex, the sale of Gulf Oil Trading Company to GOTCO N.V., the sale of the Cedar Bayou polypropylene plant to Amoco Chemicals, the donation of the Harmarville Research Center to the University of Pittsburgh, the shut-down and sale of the Gulf headquarters building in Pittsburgh, and a number of other divestitures, including those to Sohio and Cumberland Farms discussed above.[19] Although the various employee reduction programs and divestitures were initiated in 1984 and 1985, some of the

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[19] The parties agree that all of these divestitures were merger-related except the Thermex divestiture and sale of the Cedar Bayou polypropylene plant to Amoco, which defendants argue had been planned prior to the merger. The Court finds that the Thermex and Cedar Bayou divestitures were carried out as part of the general restructuring incident to the merger and were therefore part of the merger-related corporate event beginning in 1984.

affected employees were not actually terminated until the first half of 1986. For example, the shut-down of Gulf's Harmarville Research Center and its Pittsburgh headquarters occurred in gradual increments during this two-and-a- half-year period.

Chevron argues that in 1986 additional terminations occurred because of the steep decline in oil prices that began in late 1985 and that these terminations were not merger-related and should not be included as part of any "merger-related" significant corporate event. The evidence shows that Chevron's response to the decline in oil prices was to formulate, in the spring of 1986, a new retirement enhancement program known as the Special Retirement Allowance Program ("SRAP").[20] However, this program was not even announced to employees until June 1986, and the program did not begin until July 1986. (Plaintiffs' Ex. 865) The Court finds that none of the employee terminations that occurred during the first six months of 1986 were due to the decline in oil prices that occurred during that era. Instead, the Court finds that those terminations were the vestigial effects of merger-related actions--both across-the-board reductions-in-force and the divestitures--that began in 1984 and 1985.[21] The Court finds that all of the terminations between January 1, 1984, and June 30, 1986, that are reflected in the charts above were part of a single, significant, merger-related corporate event.

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[20] SRAP is discussed in greater detail in part V.C., infra.

[21] Although Chevron presented testimony that the merger-related terminations were largely completed by January 1986, the weight of the credible evidence, both from a number of former Gulf employees whose merger-related terminations did not actually occur until after January 1986, and through documentary evidence, was to the contrary.

5. The Number and Percent are Significant

There were 6,427 employer-initiated terminations of non-vested Gulf employees during the single, merger-related, significant corporate event that occurred between January 1, 1984, and June 30, 1986. This represented a 45.2% reduction in the total number of non-vested Plan participants during the period. The Court finds that this number and this percent, and the 8,534 terminations and 34.7% decrease under the alternative analysis, are significant and resulted in a partial termination of the Gulf Pension Plan under both the significant number and the significant percent tests. The Court is led to the conclusion by the magnitude of this reduction in plan membership, by the fact that when these reductions were occurring defendants were planning to reduce the benefits available to those Gulf employees who remained,[22] and by the increased potential for a reversion because of these terminations,[23] which occurred in an atmosphere in which Chevron was considering how to revert surplus Gulf Plan assets for its general corporate use.[24] See Plan Termination Handbook § 252(4), (8)(a), and (10).

6. The IRS Determination

Defendants argue that the Court should show deference to a determination by the IRS that no partial terminations of the Gulf Pension Plan occurred. Months after this action was filed, Chevron, on the advice of its trial counsel, requested its San Francisco counsel, Pillsbury, Madison and Sutro ("PM&S"), to

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[22] See part II.C., infra.

[23] Although defendants have reduced the size of any potential reversion by agreeing to vest all non-vested employees terminated during this period, the Court's analysis is based on the contemporaneous facts, not those produced from four years of subsequent litigation.

[24] See part III.B.3.c., infra.

seek a determination from the San Francisco Regional Office of the IRS that a partial termination of the Gulf Pension Plan had not occurred. On May 1, 1987, PM&S submitted a letter accompanied by an IRS Form 5300 seeking a determination that the new Chevron Retirement Plan was a qualified plan under ERISA. Although IRS Form 5300 contains a box to check if a plan sponsor requests a determination on the issue of partial termination, Chevron did not check this box (Defendants' Ex. 18 at p. 6, line 3.a.(iv)), and PM&S' letter neither requested a determination on the partial termination issue nor submitted any information regarding this issue. In a separate cover letter that accompanied the May 1, 1987, request, PM&S referred to this lawsuit and requested expedited treatment of the application for determination. (Defendants' Ex. 18 at p. 1) As required by IRS procedures, Chevron gave notice of the May 1, 1987, request to Gulf Plan participants who were still on its payroll and to certain collective bargaining representatives, but gave no notice to former employees who were members of the then alleged class in this action. Since the request did not seek a determination on the partial termination issue, the notice made no mention of that issue. (Defendants' Ex. 17)

On September 2, 1987, PM&S received questions from the IRS regarding the determination request, which PM&S labeled as "very limited and quite innocuous." (Defendants' Ex. 15 at pp. 2 and 3) In a September 2, 1987, letter to Chevron, PM&S stated that in addition to the information sought by the IRS, Chevron's submission "will also include a request that the Service make a determination that there was no partial termination of the Gulf Plan during the years at issue in the Borst litigation. Generally speaking, reviewers like to move active cases along very quickly, so we should receive a prompt response to this filing." (Defendants' Ex. 15 at p. 1) True to its word, on October 5, 1987, PM&S hand-delivered to the IRS District Director in San Francisco a letter responding to the IRS' questions. (Defendants' Ex. 16) In one paragraph,

comprising a third of a page, PM&S also requested a determination that there was no partial termination of the Gulf Pension Plan during the years 1982 through June 30, 1986.[25] (Id. at p. 5.) Attached to the letter were three pages of Chevron calculations showing the percentage reductions. Neither the letter nor accompanying calculations provided any discussion of the events surrounding the numbers presented. PM&S did not notify either present or past members of the Gulf Pension Plan or class counsel in this action of this "modification" of its determination request. Although the head of the PM&S Employee Benefits and Deferred Compensation section admitted that if the partial termination determination request contained in the October 5, 1987, letter had been considered as a separate determination request, a separate notice to interested parties would have been required under IRS regulations, she opined that no notice was required of the October 5, 1987, letter because the request was included in a response for information requested by the IRS. On December 9, 1987, the IRS District Director in San Francisco issued a favorable determination to Chevron. (Defendants' Ex. 19) The determination is one page in length, contains no analysis of issues to which this Court has devoted over 20 pages, and appears to be largely a form letter.

ERISA requires notice to interested parties each time the sponsor of a tax qualified plan requests an IRS determination letter. § 3001(a) of ERISA, 29 U.S.C. § 1201(a). The notice to interested parties must specify procedures by which interested parties (generally participants in the plan and their collective bargaining agents) can obtain copies of the materials filed with

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[25] The partial termination determination request was limited by its language to plaintiffs' vertical partial claim. Barbara Creed, the head of the PM&S Employee Benefits and Deferred Compensation section, who was in charge of this effort, testified that Chevron never sought an IRS ruling on the horizontal partial termination issue.

the IRS, and can file written comments with the IRS, or request the Department of Labor to file comments with the IRS. Rev. Proc. 80-30, 1980-1 C.B. 685, §§ 6 and 7. The notice to interested parties must also indicate the subject matter of the determination letter request. Id. at § 7.03(4). In the case of a plan termination, including a partial plan termination, former as well as current employees are interested parties who must receive notice. Id. at §§ 3.01(4) and 6.01; Treas. Reg. § 1.7476-1(b)(5) (1976). The purpose of these notice requirements is to afford parties who may have views different from the plan sponsor to make those views known to the IRS before it makes a determination.

Chevron's failure to notify any Gulf Pension Plan participants that it was seeking a determination of the vertical partial termination issue was contrary to the IRS regulations and the underlying policy requiring notice. This failure also violates fundamental fairness and the reasonable claims procedure requirements of § 503 of ERISA, 29 U.S.C. § 1133. Apart from the serious procedural defect in the way Chevron obtained the IRS determination letter, the Court also finds that the IRS determination is due no deference because it evidences no investigation or legal analysis of the facts by the IRS. For both reasons the Court concludes that the IRS determination letter is entitled to no weight, and the Court has given it none.[26]

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[26] To its credit the IRS recently advised PM&S that it is reconsidering the determination letter because of Chevron's failure to notify all interested parties. (Plaintiffs' Ex. 1269) In its notice to Chevron of reconsideration the IRS stated that "[i]f all interested parties were not notified then . . . no reliance could be placed on [the] letter and recision would be retroactive." Id.

C. Horizontal Partial Termination

The horizontal partial termination rule is found in Treas. Reg. § 1.411(d)- 2(b)(2).

> Special rule. If a defined benefit plan ceases or decreases future benefit accruals under the plan, a partial termination shall be deemed to occur if, as a result of such cessation or decrease, a potential reversion to the employer, or employers, maintaining the plan (determined as of the date such cessation or decrease is adopted) is created or increased. If no such reversion is created or increased, a partial termination shall be deemed not to occur by reason of such cessation or decrease.

The rule has two elements: a cessation or decrease in future benefit accruals in a defined benefit plan and a resultant creation or increase of a potential reversion to the employer. The rule does not require that an employer actually attempt to achieve a reversion, only that a potential for reversion exist because of a cessation or decrease of future benefit accruals.[27]

The partial termination claim arises because of changes in the benefits that were available to former Gulf employees under the Gulf Pension Plan and those available to them after the Gulf

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[27] Defendants argue that under the literal wording of this regulation any reduction by an employer in future benefit accruals, no matter how de minimis, could result in a partial termination. Such a situation is not before the Court, however, because, as discussed infra, the reductions in issue were at least $80 million and, far from being de minimis, would satisfy defendants' proposed requirement, based on § 320(1) of the IRS Plan Termination Handbook, that a "substantial decrease of participants' benefit accruals [occur]."

Pension Plan and the Chevron Annuity Plan were merged into the new Chevron Retirement Plan effective July 1, 1986. Plaintiffs argue that the effect of the plan merger was to reduce substantially future benefit accruals to former Gulf employees, thereby increasing the potential for a reversion to Chevron upon any final termination of the merged plan.

As evidence of this decrease in future benefit accruals, plaintiffs cite a September 25, 1985, presentation to the Chevron Executive Committee analyzing the prospective plan merger. (Defendants' Ex. 353) The presentation projected that the Chevron Retirement Plan would achieve a decrease of $102 million in present value liability through net decreases in benefits that would otherwise have been paid to former Gulf employees under the Gulf Pension Plan.[28] (A $162 million increase in present value liability was projected for improved benefits to former Chevron employees under the merged plan.)

Another schedule presented to the Executive Committee at the same presentation (Plaintiffs' Ex. 529) showed that this $102 million decrease was achieved because the increase in the present value of the more favorable lump- sum death benefits to former Gulf employees under the merged plan (+$30 million) was more than offset by four other changes:

(1) undiscounted retirement at age 60 under the Gulf Plan was ended, thus eliminating future accruals of this benefit for service after the July 1, 1986, Plan amendment (-$17 million);

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[28] When adjusted to take into consideration the smaller number of Gulf employees actually employed on the date of the plan merger, this decrease was $94.9 million. Because most of the evidence presented by both sides focused on the $102 million decrease, the Court will generally refer to this figure.

(2) the immediate payment of disability retirement benefits to employees with at least 15 years of service under the Gulf Plan based on the level of compensation and years of service to the date of disability without any early retirement discount was eliminated and substituted with an actuarially discounted benefit (-$65 million);

(3) the 40% post-retirement spousal annuity was frozen, thereby eliminating future accruals of this benefit for service after the July 1, 1986, plan amendment (-$31 million); and

(4) the pre-Social Security "bridge" benefits provided for Plan members whose early or disability retirement benefit began before age 62 was restricted to service up to the July 1, 1986, Plan amendment, thus eliminating future accruals of this benefit (-$19 million).

Analyzing the same changes in pension plan benefits, plaintiffs' actuarial expert, William A. Dreher, independently calculated a reduction in pension liability of $118,563,000. (Plaintiffs' Ex. 1255 at p. 14) After considering improvements in SRAP benefits to former Gulf employees under the Chevron Retirement Plan, Dreher testified that the net reduction in future benefit accruals to former Gulf employees was $83,803,000.[29]

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[29] The difference between Dreher's net number and defendants' September 25, 1985, calculations occurs primarily because Dreher differed on the method of calculating the decrease in future accruals of disability benefits and the increase in future accruals of lump-sum death benefits. The Court finds

(Plaintiffs' Ex. 1254, column 4.b) Dreher testified that on June 30, 1986, the Gulf Pension Plan had fully funded all past and future benefit accruals for present employees and was overfunded on an ongoing Plan basis by $125 million. According to Dreher, the net effect of the Gulf Pension Plan changes enacted by Chevron was to increase substantially the already overfunded status of the Plan, thereby also increasing the amount of any reversion to Chevron were the Chevron Retirement Plan terminated, or, in any event, allowing Chevron to delay the amount or timing of further contributions to the merged plan.

Defendants mount both factual and legal defenses against the alleged horizontal partial termination. At trial Chevron witnesses Neil Darling, who in 1985 was responsible for financial affairs of all Chevron pension plans, and Alex Ross, who was then manager of the Chevron corporate benefits staff, attempted to deflate the size of the $102 million projected decrease and to disavow its importance in several ways. First, Darling sponsored a chart designed to show that the $102 million estimated decrease was inaccurate by $59 million and that the correct estimated decrease was only $43 million. (Defendants' Ex. 348) When other non-pension plan benefits available under the Chevron Profit Sharing/Savings Plan were also considered, Darling's chart purported to show that the present value of future benefits to former Gulf employees under the Chevron Retirement Plan actually increased by $32.5 million.

Ross reiterated Darling's contentions and testified that the $102 million decrease was not intended to represent a reduction in benefit accruals to Gulf Plan members. He also testified that because of a recently discovered oversight, the -$102 million figure was unreliable because it failed to include more favorable

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Dreher's method of calculation and resulting numbers to be more reliable.

benefits under the Chevron Annuity Plan which, although carried forward into the merged Chevron Retirement Plan, were not considered in the 1985 presentation to the Executive Committee or in other contemporaneous Chevron documents.

The Court is not persuaded by Chevron's attempt at trial to disassociate itself with figures developed over a number of months and presented by the manager of its corporate benefits staff to the Chevron Executive Committee at the conclusion of extensive planning by Chevron to evaluate the cost and method of merging the Gulf Pension Plan and Chevron Annuity Plan. The Court does not find Defendants' Ex. 348 to be relevant because some of the offsetting adjustments used to moderate the $102 million decrease to a $43 million decrease, e.g., replacement of lump-sum death benefits with life insurance coverage and replacement of disability retirement benefits with a company-paid, long-term disability insurance plan, do not affect the liability of the Gulf Pension Plan or the Chevron Retirement Plan. Although these changes and the others discussed in the next two paragraphs may be relevant to the general effect of the plan merger on former Gulf employees, they are not relevant in determining whether there was a decrease in the present value of Gulf pension plan liability, which is the issue represented in defendants' 1985 documents (Plaintiffs' Ex. 529; Defendants' Ex. 353), or whether there was a decrease in future benefit accruals under the Chevron Retirement Plan within the meaning of the horizontal partial termination rule, Treas.Reg. § 1.411(d)-2(b)(2).[30] For the

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[30] Before the enactment of ERISA in 1974, IRS regulations allowed anemployer to avoid a partial termination of a pension plan by instituting a separate "comparable" pension plan. Treas.Reg. § 1.401-6(b)(1) (1963). Even under those rules, which do not apply to this case [see Plan Termination Handbook § 252(12)], a partial termination could be avoided only by replacing the partially terminated plan with a comparable, tax-qualified retirement plan, which in the case of a pension plan, could only be another pension plan unless the IRS specifically approved another

same reason the alleged benefit that former Gulf employees now receive under the Chevron Profit Sharing/Savings Plan, which Chevron argues resulted in an increase in Chevron's liability by $32.5 million, is irrelevant in considering a possible horizontal partial termination of the Gulf Pension Plan.[31]

Nor is the Court persuaded by Ross' testimony that improved benefits to former Gulf employees under the Chevron Retirement Plan should be considered as offsetting any possible effect of the $102 million decrease presented to the Chevron Executive Committee. Defendants' Ex. 363 lists these additional improvements, some of which are also quantified in Defendants' Ex. 348. Some of these improvements, such as the ability of a former Gulf employee to retire from Chevron and elect a lump-sum payment instead of an annuity, were not considered to be plan benefits during the plan merger discussions because of their optional nature. (Plaintiffs' Ex. 212, October 17, 1985, Memo from Carter to Ross) There was even disagreement on the witness stand between Darling, who thought this option was not a benefit, and Ross, who now thinks it is. Both witnesses agreed, however, that it would be very difficult to quantify the effect of this alleged benefit because a former Gulf employee who elected a lump-sum pension payment option would lose the benefit of the 40% annuity his spouse would otherwise be entitled to receive (a benefit based

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comparable plan. (Treas.Reg. § 1.401-6(b)(1) defined a "comparable" replacement plan by reference to Treas.Reg. § 1.381(c)(11)-1(d)(4), which provided that only a pension plan would be considered comparable to another pension plan.)

[31] Apart from the legal differences between a pension plan and a profit sharing plan, Chevron's documents and witnesses acknowledged that unlike a defined benefit pension plan, there are market risks inherent in a profit-sharing plan. E.g., Plaintiffs' Ex. 136, September 3, 1985, memorandum from Chevron Comptroller G. K. Carter to Louis Fernandez, Jr., Vice- President of Human Resources, at paragraph 3.

on the employee's past as well as future service) and would likewise lose the benefit of any future AVIS pension enhancements that Chevron might declare.

Ross attempted to demonstrate the effect of five of the plan improvements listed in Defendants' Ex. 363 (and to refute Dreher's testimony) through exhibits showing the effect of the alleged Chevron improvements on five categories of former Gulf employees: Case A--Terminated Vested Benefits, Case B--Disability Benefits, Case C--Death Benefits, Case D--Early Retirement Benefits, and Case E--a different Early Retirement Benefit scenario. (Defendants' Exs. 361 and 362) Ross admitted, however, that if non-pension welfare benefits and benefits under the Chevron Profit Sharing/Savings Plan were not considered, and the focus was limited solely to improved pension benefits under the Chevron Retirement Plan, former Gulf employees who fell within Cases D and E would be better off under the Gulf Pension Plan. He also admitted that under that scenario it would not be possible to make an accurate comparison of benefits under the two plans for Cases A and B and that only under Case C--Death Benefits, would former Gulf employees be better off under the Chevron Retirement Plan. Ross acknowledged that very few employees would fall under Case C and, more importantly, he testified that none of the five cases compared normal retirement benefits under the two pension plans.

The most important factor in the Court's analysis of defendants' factual defense, however, is that Chevron's exhibits and supporting testimony are all admitted after-thoughts developed in the course of this litigation. Chevron documents from 1985 show that Ross and Darling then believed and told the Chevron Executive Committee that the new Chevron Retirement Plan would create a decrease of $102 million in the present value of benefits otherwise payable under the Gulf Pension Plan. Chevron's litigation position that this 1985

estimate was unreliable because of an oversight in the way it was calculated, or its failure to also address non-pension benefits or additional benefits under the Chevron Retirement Plan, does not ring true.

There was abundant evidence besides the documents prepared for the September 25, 1985, Executive Committee presentation that Chevron anticipated and planned for a reduction in Gulf pension benefits. In an August 8, 1985, memo to Ross (Plaintiffs' Ex. 190), Carter stated that "Gulf participant liability has been reduced $205.2 million while Chevron participant liability has increased $176.7. This reflects the deliberalization of some Gulf Plan provisions . . ." The plan design described in this memo went through several modifications, e.g., Plaintiffs' Ex. 138, September 9, 1985, memo from Carter to Ross, and ultimately resulted in the benefit structure that achieved the $102 million reduction presented to the Executive Committee on September 25, 1985.

The March 5, 1984, corporate merger agreement between Gulf and Chevron limited to two years Chevron's obligation to continue pension benefits to former Gulf employees at the pre-merger level. (Plaintiffs' Ex. 497 at § 6.10) On July 1, 1986, less than three months after the expiration of this two-year period, Chevron merged the Gulf Pension Plan and the Chevron Annuity Plan into the Chevron Retirement Plan, and reduced benefits to former Gulf employees. Section 204(h)(1) of ERISA, 29 U.S.C. § 1054(h)(1). requires a plan administrator to give plan members written notice of any plan amendment that provides "for a significant reduction in the rate of future benefit accrual [s]." In June of 1986, shortly before the plan merger, Chevron filed a notice under § 204(h)(1) articulating seven ways in which the July 1, 1986, amendments to the Gulf Pension Plan resulted in such reductions of benefit accruals. (Plaintiffs' Ex. 552) Four of the reductions listed

were those quantified in arriving at the $102 million decrease shown on Plaintiffs' Ex. 529.[32]

In assessing defendants' factual defenses to plaintiffs' horizontal partial termination claim, the Court finds that defendants' contemporaneous belief, not a position developed for trial, is most probative of the truth. The contemporaneous evidence establishes that when Chevron was planning to merge the two plans it consistently considered reducing benefits available under the Gulf Pension Plan and ultimately concluded that these reductions would result in a $102 million decrease in Chevron's pension plan liability to former Gulf employees.

Defendants also argue that the Gulf Pension Plan changes quantified in Plaintiffs' Ex. 529, and in particular the change in disability retirement benefits, cannot be considered in determining if a horizontal partial termination occurred because the horizontal partial termination rule only protects "accrued benefits," and these four categories of reduced benefits are "non-accrued," or "ancillary benefits." This argument is premised upon the contention that the term "benefit accruals" in the rule refers to the rate at which an employee earns an "accrued benefit," which is defined, in the case of a defined benefit plan, by Code § 411(a)(7)(A)(i) as "the employee's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age . . . ." According to defendants, none of the four benefits that were reduced meet this definition because they

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[32] The introduction to the notice stated that the notice did not include the changes in the restructured pension plan that provided for "a significant increase in the rate of future benefit accruals." Only one pension plan change that arguably benefited Gulf Plan participants was mentioned in the notice. Id. at p. 3, paragraph 9. Moreover, as discussed above, even after giving defendants the benefit of the other improved pension plan benefits that were quantified at trial, there remained a significant net decrease in benefit accruals.

did not have a specified accrual rate and did not commence at normal retirement age.[33]

The crux of defendants' argument is that because Code § 411 "protects only accrued benefits" (Defendants' Post-Trial Brief Regarding Horizontal and Vertical Partial Termination at p. 3), the horizontal partial termination rule adopted to implement this section of the Code must also be limited in scope to protecting future accruals of accrued benefits. Defendants argue that the rule does not prohibit an employer from prospectively eliminating or reducing ancillary benefits.

The Court is not persuaded by this argument for several reasons. Defendants have cited no authority, and the Court has found none, that would so circumscribe Code § 411 or the horizontal partial termination rule. Although § 411 is indeed full of references to "accrued benefits," the only reference in § 411(d)(3) to benefits, whether accrued or otherwise, occurs in addressing the remedy for a plan termination. Section

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[33] The principal impediment to satisfying the "accrued benefit" definition is that these benefits do not commence at normal retirement age. All of them can be expressed in the form of an annual benefit, and they all accrued, or grew, with an employee's additional service and salary increases. Although the rate of such growth may not have been as predictable as a regular pension benefit, the right to receive these benefits nevertheless "accrued" under the Gulf Plan in the sense that a Gulf employee or spouse's right to receive them, or to receive them in a greater amount, was enhanced as the employee worked longer and achieved a higher salary. Chevron was not hesitant, either when planning for the plan merger or through its trial witnesses, Darling and Ross, to calculate, based upon actuarially sound principles, the present value of the decreases in funding obligations that would result from eliminating future accruals of these benefits. Also, while "accrued benefits" do not normally encompass ancillary benefits such as disability benefits, see § 3(23) of ERISA, 29 U.S.C. § 1002(23), and Code § 411(a)(7)(A)(i), a pension plan may provide such ancillary benefits, and when it does, they must be taken into account in funding the plan. Code § 412(1)(7).

411(d)(3) provides that if a termination or partial termination has occurred, the remedy is to vest "all affected employees to benefits accrued to the date of such . . . partial termination ... to the extent funded as of such date . . . ." Given the repeated use of the term "accrued benefits" in parts of § 411 other than § 411(d)(3), the Court does not conclude that the failure of § 411(d)(3) to define a partial termination by reference to a particular type of benefit, and the failure of Treas.Reg. § 1.411(d)-2(b)(2) to speak in terms of a plan amendment that decreases future accruals of "accrued benefits," were drafting oversights.

Section 252 of the Plan Termination Handbook is also inconsistent with such a limited reading of the horizontal partial termination rule. It states:

> (2) The regulations under IRC 411 do not refer to the curtailment concept[34] as determinative of whether there has been a partial termination. Therefore, when benefits or employer contributions are reduced or the eligibility or vesting requirements under the plan are made more restrictive, facts and circumstances, other than the mere fact that benefits, employer contributions, etc. have been cut back, enter into the determination of whether there has been a partial termination . . . .
>
> (3) I.T.Regs. 1.411(d)-2(b)(2) sets forth a "special rule" for defined benefit plans which cease future accruals. In such a case, a

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[34] The curtailment concept is a historical predecessor of both vertical and partial terminations. "A curtailment consists of a modification of a plan reducing benefits or employer contributions." Goodman, supra, at 54.

> partial termination shall be deemed to occur if, as a result of such cessation or decrease, a potential reversion to the employer is created or increased. If no such potential for reversion is created or increased, a partial termination shall not be deemed to occur solely by reason of the cessation or decrease . . . . (emphasis added)

Section 22.5 of the IRS Training Program, which deals with Employee Plans, also focuses on future benefit accruals, not curtailment of accrued benefits.

The Court concludes that the horizontal partial termination rule, although not a model of clarity, is intended to deter employers from adopting plan amendments that lessen accruals of future benefits, including ancillary benefits, if the effect of such an amendment would be to create or increase the likelihood that the employer would receive a reversion of plan assets in the future. This is a broader goal than the other provisions of § 411, which protect already accrued benefits. Many employers make plan contributions not only to keep pace with currently accrued benefits but also to fund future liabilities, which although they have not yet been incurred, will be incurred in the future if the employer's actuarial projections concerning future increases in time-in-service and salary prove correct. Those future benefit accruals (which are not protected by the anti-cutback rule) are protected by the horizontal partial termination rule.

Were an employer allowed to avail itself of such a source of funds by deliberalizing benefits that have been promised, but not yet accrued, the employer would have an economic motive for amending a pension plan to eliminate or reduce future accruals of benefits promised by the plan. This is exactly what happened here. Chevron adopted a new pension plan that

substantially reduced future accruals of benefits to former Gulf (but not former Chevron) employees at a time when the Gulf Plan was overfunded on an ongoing basis by $125 million. When Chevron made these changes it was aware of the potential economic advantage of doing so through either a reversion of the surplus or by using the surplus to fund future benefit obligations.

In defining the scope of the horizontal partial termination rule it is important not to lose sight of the remedy it affords. Neither ERISA nor the Code expressly protects "unearned" benefits, i.e., benefits based on future service. See Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1175 (11th Cir.1988). Unlike breaches of ERISA's fiduciary provisions, which are remedied by damages, and violations of the anti-cutback rule of Code § 411(d)(6), which can result in disqualification of a plan, see Code § 401(a)(7), the remedy for a horizontal partial termination is merely to vest the affected *1178 employees in accrued (i.e., earned) benefits (which were selected by the employer in the first place) to the extent they have been funded by the employer. The employer is saddled with no additional plan contributions, damages, or disqualification of its plan; the horizontal partial termination rule only reduces the employer's ability to obtain a reversion of its previous, tax-deductible, contributions to the plan.

The Court does not find persuasive defendants' attempt to read into the horizontal partial termination rule a limitation that is not corroborated by the Code or its implementing regulations and that would disserve the policies underlying the rule.[35]

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[35] The Court is not persuaded by defendants' argument that since the remedy for partial terminations is only vesting of benefits accrued to the date of the partial termination, the rule could not have addressed reductions or decreases in future benefit accruals because it does not fully redress that wrong. (Defendants' Post-Trial Brief Regarding Horizontal and Vertical

Although the horizontal partial termination rule could have been drafted to make its meaning clearer, the Court concludes that the reductions in benefits imposed by the Chevron Retirement Plan satisfy both the language and purpose of the rule. The changes enacted by Chevron in benefits that would otherwise have been available to plaintiffs under the Gulf Pension Plan resulted in decreases in future benefit accruals within the meaning of the horizontal partial termination rule. These decreases increased the potential reversion to Chevron if the Chevron Retirement Plan were terminated. The Court therefore finds that a horizontal partial termination occurred as a result of the elimination of these future benefit accruals by merging the Gulf Pension Plan into the Chevron Retirement Plan. The Court will order that all members of the class who were employed by Chevron on July 1, 1986, be vested in all Gulf Pension Plan benefits accrued as of that date.[36]

The Court also concludes that even were these reductions in future benefit accruals insufficient to result in a finding of horizontal partial termination, they would nevertheless be

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Partial Termination at p. 4) Although the vesting remedy may not provide complete relief in every case, it does provide a remedy that is easy to calculate for affected employees. That the remedy chosen by Congress may not always fully address the wrong sought to be corrected does not mean, as defendants seem to suggest, that the Court should decline to reach a result that affords even that limited remedy.

[36] Perhaps the only advantage of the absence of precedent dealing with horizontal partial terminations is that this rule has not become encrusted with the significant number or percent analysis that complicates the vertical partial termination rule. Nevertheless, should a higher court adopt a percentage analysis, the Court finds that even adopting the defendants' argument of only a ten percent reduction in prospective benefit accruals ($102 million divided by $1.016 billion; see Defendants' Post-Trial Brief Regarding Horizontal and Vertical Partial Terminations at pp. 10-11), that percentage reduction would be substantial and would result in a partial termination.

additional "fact[s] and circumstance[s]" that would support the Court's finding of a vertical partial termination. See Plan Termination Handbook § 252(8)(a) and (10).[37] The Court is not persuaded by defendants' argument that the combined effects of facts that could lead to findings of both types of partial terminations cannot be considered since the remedies for vertical and horizontal partial terminations benefit different groups of employees. Different remedies apply because different manifestations of an employer's conduct frustrate different employee expectations. A vertical partial termination affects non-vested terminated employees, and the remedy therefore is to vest them when their employment ended. A horizontal partial termination affects current employees through the cessation or decrease in future benefit accruals, and the remedy is to vest them in their then accrued benefits. Both the history and purpose of the partial termination rule convince the Court that horizontal partial terminations defined in the "special" rule are merely a particular type of partial termination covered by the "general" rule. See Treas.Reg. 1.411(d)-2(b)(1) and (2).

III. REMEDY FOR PARTIAL TERMINATION

The remedy provided by Code § 411(d)(3) for a partial termination is to vest all non-vested plan members in accrued benefits on the date of the partial termination. Plaintiffs argue that the Gulf Pension Plan also entitles them to an allocable share of surplus assets upon a partial termination. Analysis of

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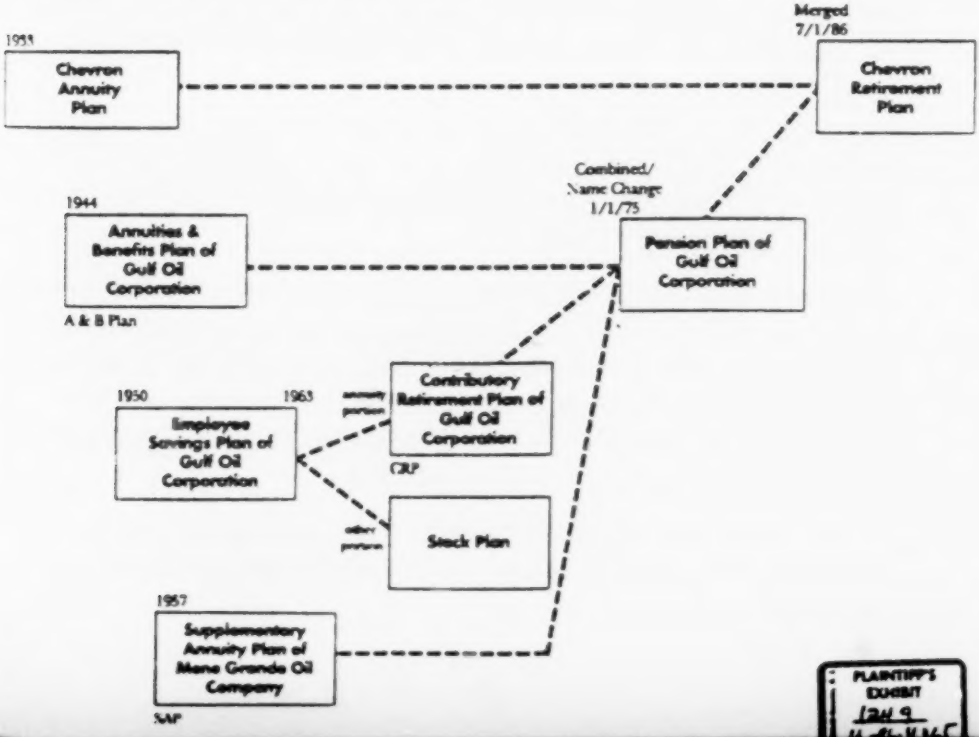
[37] Before ERISA both types of partial terminations were contained in the same rule. Treas.Reg. § 1.401-6(b)(2) (September 16, 1963). Before then, they were both examples of the curtailment concept. See Mim. 6136, 1947-1 C.B. 58, 60 at para. 5. Although their organization in the current Treasury Regulations has changed slightly, both types of partial terminations are intended to achieve the same policies--deterring employer reversions of tax-free plan contributions and protecting the expectations of employees. See United Steelworkers, 706 F.2d at 1298.

this claim first requires some understanding of the history of the Gulf Pension Plan.

A. The Gulf Pension Plan

The Gulf Pension Plan was created in 1975 as an amendment, restatement and continuation of the Annuity and Benefits Plan of Gulf Oil Corporation ("A&B Plan"), the Supplemental Annuity Plan of Mene Grande Oil Company ("SAP") and the Contributory Retirement Plan of Gulf Oil Corporation ("CRP"). The A&B Plan, originally established in 1944 as the successor of a 1927 plan, contained only employer contributions. The SAP, established in 1957, covered employees in Venezuela who worked for the Mene Grande Oil Company. The CRP, established in 1963, was a continuation of the Employees' Savings Plan of Gulf Oil Corporation ("ESP"), which was created in 1950. Plaintiffs' Ex. 1249 depicts this history.

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE



PLAINTIFF'S EXHIBIT 1249

Both the SAP and the CRP contained employee and employer contributions. The SAP and CRP have never been terminated, although no additional employee contributions were made to these plans after December 31, 1970. Gulf made no contributions to either plan after they were amended in 1975.[38]

After the 1975 amendments Gulf generally administered the three plans as a single merged plan. However, the Gulf Plan acknowledged that the trust funds of the three plans would be separately maintained and not merged. (January 1, 1976, Gulf Plan Foreword, paragraph 1, and § 8.A.; Plaintiffs' Ex. 401 at pp. 1 and 51) [39] From 1976 to 1979 the plans' assets were governed by separate trust agreements.[40] Beginning in 1979 the plans' assets were governed by a single "Master" Trust Agreement that allowed commingling of assets attributable to the three plans for investment purposes. The Master Trustee was required, however, to account separately for the assets and liabilities of each plan and to "insure that benefits and liabilities payable with respect to each Plan shall be paid only from the assets held by the Master Trustee which are allocable to each such Plan." (1979 Master Trust Agreement § 2.6, Plaintiffs' Ex. 391 at p. 4) There was no evidence that Gulf ever used the

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[38] Whether Gulf made contributions from 1970 to 1975 is disputed. See part III.B.2.b.(2)(c)(ii), infra.

[39] Citing this and other Plan language, a May 16, 1978, confidential Gulf memo states that "[i]t would be morally wrong to commingle the funds since we have told employees that the trust funds will not be merged." (Plaintiffs' Ex. 1073) In an April 24, 1978, legal opinion, Gulf attorney William Bowman gave the same advice in more formal terms. (Defendants' Ex. 250)

[40] Plaintiffs' Ex. 443, 1976 CRP Trust Agreement; Plaintiffs' Ex. 419, 1976 SAP Trust Agreement; Plaintiffs' Ex. 390, 1976 A&B Trust Agreement.

assets of one plan to pay benefits under another plan, and Gulf continued to account separately for the assets and liabilities of each plan.

Defendants cite an IRS determination approving the 1975 plan merger (Defendants' Ex. 3) and a certification from Gulf's enrolled actuary (Defendants' Ex. 7) as evidence that the plans were merged in 1975. The Court does not find that the correspondence that defendants furnished between the IRS and Gulf supports defendants' argument. In this correspondence Gulf stated that "the trust funds are being continued as separate trust funds" (June 2, 1976, letter, Defendants' Ex. 3 at p. G4B017104), but failed to mention that assets of one trust were unavailable to pay benefits due under other plans. An earlier letter made the same statement, and enclosed a number of documents, but not the trust agreements (December 29, 1975, letter, Defendants' Ex. 3 at p. G4B001055). Both IRS determinations contain less than a page of text and are largely form documents that evidence no awareness of the trusts' limitations and contain no legal or factual analysis. (Defendants' Ex. 3 at pp. G4B006896 and G4B001058) The actuarial certification only addressed the validity of the merger under § 208 of ERISA, 29 U.S.C. § 1058. Before the propriety of a proposed merger under § 208 of ERISA even becomes relevant, the plans must first qualify as a single plan under ERISA. See Treas.Reg. § 1.414(1)-1(b)(2), IRS Private Letter Rulings 7918014 (January 30, 1979), 7943126 (July 27, 1979), and 8725089 (March 27, 1987). The Court therefore accords little weight to the IRS determinations and the actuarial certification.

In determining whether a merger of plans has occurred, "the substance rather than form of a transaction controls." IRS Private Letter Ruling 8725089 at p. 2; see PBGC Opinion 85-2 (January 14, 1985). Although defendants met some of the formalistic requirements of a plan merger, and although

defendants frequently refer to the 1975 "plan merger" (and the Court sometimes does so for ease of style), the Court finds that the three plans were not merged in 1975 into a "single plan" under ERISA because all of the assets of each plan were not available on an ongoing basis to pay benefits due under the other plans. See Treas.Reg. § 1.414(1)-1(b)(1).

B. Remedy Under the Gulf Pension Plan Upon a Partial Termination

Before July 1, 1986, when the Gulf Pension Plan was merged into the Chevron Retirement Plan, §§ 4.D and 10.A.2 of the Gulf Plan addressed the consequences of a plan termination. Section 4.D required that in the event of a partial plan termination all Plan participants were to be vested in their pension benefits regardless of years of service. Section 10.A.2, which addressed both complete and partial plan terminations, provided in pertinent part:

> Distribution of Assets. Upon termination of the Plan the rights of members to the benefits accrued under the Plan to the date of such termination, to the extent then funded, shall be nonforfeitable. All of the assets held in trust, after provision for any properly chargeable expenses, shall be used solely for the members, pensioners, spouses, beneficiaries and joint pensioners until all liabilities under the Plan shall have been satisfied in full. The Benefits Committee shall determine on the basis of an actuarial valuation the share of the funds of the Plan allocable to each member, pensioner, spouse, and joint pensioner in the following order.

(The Plan then sets out a six-tier schedule for the distribution of assets upon termination.)

. . .

In the event of a partial termination of the Plan the provisions of this section 10 A-2 shall be applicable to the members affected by such partial termination.[41]

In no event shall any part of the Plan assets held in trust or any income on it, prior to the satisfaction of all liabilities under the Plan, revert to the Company or be used other than for the members, pensioners, spouses, beneficiaries and joint pensioners. (Defendants' Ex. 29 at pp. 44-45)

Plaintiffs argue that § 10.A.2 entitles them to a distribution of all surplus assets of the Gulf Plan upon a partial plan termination.[42] Defendants do not dispute that upon a complete termination of the Gulf Plan members would be entitled to a return of surplus CRP and SAP assets that are attributable to their own contributions. See § 4044(d)(2) of ERISA, 29 U.S.C. § 1344(d)(2). Defendants deny, however, that § 10.A.2 or the three predecessor plans afford plaintiffs any right to surplus assets resulting from employer contributions. Alternatively, defendants argue that if plaintiffs are entitled to that part of the surplus attributable to employer contributions,

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[41] This paragraph was added by a 1982 amendment. Compare Plaintiffs' Ex. 401, the 1975 Gulf Plan, with Plaintiffs' Ex. 402, the December 31, 1982, Gulf Plan.

[42] Although plaintiffs deny that the three plans were merged in 1975, they acknowledge that the 1975 Gulf Plan was the amended plan document that governed each of the three plans from 1975 until July 1, 1986.

that right would only accrue, and any surplus assets would only be distributable, upon a complete Plan termination.

1. Standard of Review

ERISA fiduciaries are obligated to operate pension plans solely in the interest of participants in accordance with the instruments governing the plan. § 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D). ERISA allows plan participants to sue to recover benefits provided them by the terms of a pension plan. § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). A § 502(a)(1)(B) action challenging benefit denials is reviewed under a de novo standard unless the plan gives the administrator discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S. Ct. 948, 956, 103 L. Ed. 2d 80 (1989). If so, the administrator's decisions are reviewed under an abuse of discretion standard.

Section 7.C of the Gulf Pension Plan made the Gulf Plan Benefits Committee the administrator of the Plan for purposes of ERISA. (After the plan merger this responsibility was assumed by Chevron Corporation.) Section 7.C.4 gave the Benefits Committee all powers necessary to carry out the provisions of the Plan including, but not limited to, "the powers necessary to . . . construe and interpret the Plan and, subject to the provisions of the Plan, decide all questions of eligibility and determine the amount, time and manner of payment of any benefits hereunder." (s 7.C.4(a); Defendants' Ex. 29 at p. 32) However, the Benefits Committee could not "add to, subtract from, or modify the terms of the Plan or change or add to any benefits provided by the Plan, or to waive or fail to apply any requirements of eligibility for benefits under the Plan." (Section 7.C.4 at p. 33) The language of § 7.C.4 is sufficient under Firestone for the abuse of discretion standard to apply.

Application of the abuse of discretion standard may involve a two-step process. First, the Court must determine the legally correct interpretation of the plan's provisions. If the administrator did not give the plan the legally correct interpretation, the Court must then determine whether the administrator's decision was an abuse of discretion. Jordan v. Cameron Iron Works, Inc., 900 F.2d 53, 56 (5th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 344, 112 L.Ed.2d 308 (1990).

2. The Legally Correct Interpretation

In determining the legally correct interpretation of a plan provision the Court must consider (1) whether the administrator has given a uniform construction to the plan, (2) whether the interpretation is consistent with a fair reading of the plan, and (3) whether the interpretation results in any unanticipated costs. Jordan, 900 F.2d at 56.

a. Uniformity of Construction

There was no evidence that before this action the Benefits Committee had ever determined whether § 10.A.2 required allocation of surplus assets to Gulf employees upon a partial termination of the Gulf Pension Plan.[43] Accordingly, there is no basis for finding that the Committee uniformly construed § 10.A.2 of the Gulf Plan.

b. Fair Reading of § 10.A.2

Defendants advance three arguments why § 10.A.2 prohibits a distribution of surplus assets to plaintiffs: (1) § 10.A.2 was intended to apply to partial terminations only if

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[43] This does not mean, however, that Chevron and its outside counsel had not spent considerable time analyzing the Gulf Plan. See part III.B.3.c., infra.

the Plan was underfunded at the time of the partial termination, and does not apply when, as here, there is a surplus; (2) § 10.A.2 was amended by § 18.d of the Chevron Retirement Plan, which states that all surplus assets belong to Chevron, not to plan participants; and (3) even were § 18.d held to be invalid with respect to CRP or SAP assets, and even assuming that plaintiffs were entitled to surplus assets from those plans, as a matter of law and under the terms of § 10.A.2, such a right would only accrue when the assets are distributed upon complete plan termination. The Court will examine each of these arguments in turn.

(1) Does § 10.A.2 Apply When the Plan is Overfunded at the Time of a Partial Termination?

Defendants offer a complex explanation why § 10.A.2 does not apply to partial terminations when the Plan is overfunded. Defendants begin this argument with an attempt to reconcile the last two paragraphs of § 10.A.2, which state:

> In the event of a partial termination of the Plan the provisions of this Section 10 A-2 shall be applicable to the members affected by such partial termination.
>
> In no event shall any part of the Plan assets held in trust or any income on it, prior to the satisfaction of all liabilities under the Plan, revert to the Company or be used other than for the members, pensioners, spouses, beneficiaries and joint pensioners.

At trial Barbara Creed, the head of the Employee Benefits and Deferred Compensation section of PM&S, agreed that the language of the first paragraph quoted above required that

§ 10.A.2 apply to partial as well as complete Plan terminations. Creed also testified that the first and last paragraphs of § 10.A.2 permitted an employer reversion of any surplus Plan assets upon a complete Plan termination. Creed testified that to determine Gulf's intent with respect to the effect of § 10.A.2 upon a partial termination, the Court must first determine the consequences under § 10.A.2 of a complete Plan termination. According to Creed, upon a complete termination of the Plan, once all liabilities were satisfied through a distribution of assets under § 10.A.2's six-tier allocation scheme, any remaining Plan assets would revert to Gulf. Because the Code prohibits employer reversions upon a partial termination,[44] Gulf could not achieve a reversion of any surplus assets upon a partial termination notwithstanding its reversionary rights under § 10.A.2. If the Plan were underfunded at the time of a partial termination, no reversion to Gulf would be possible because all Plan assets would be exhausted via the six-tier allocation scheme. Therefore, § 10.A.2 could apply when the Plan was underfunded at the time of a partial termination without running afoul of the Code rule prohibiting an employer reversion before

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[44] The Code only allows an employer reversion upon a complete plan termination. Under Code § 401(a)(2) a plan is not a qualified trust for purposes of the Code unless it is "impossible, at any time prior to a satisfaction of all liabilities . . . for any part of the corpus or income to be (within the taxable year or thereafter) used for . . . purposes other than for the exclusive benefit of . . . employees or their beneficiaries . . . ." (emphasis added) Treas.Reg. § 1.401-2(b)(1) explains that the language of this section prohibits employer reversions prior to complete plan termination:

> The intent and purpose in § 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. (emphasis added)

a complete termination. Creed therefore concluded that since Gulf could not lawfully achieve a reversion upon a partial termination, Gulf must have intended that § 10.A.2 not apply to a partial termination if the Plan were overfunded. Although this analysis may arguably be supportable by a kind of reverse symmetry, it does not persuade the Court.[45]

The next to last paragraph of § 10.A.2 does not say that the treatment of partial terminations under § 10.A.2 is dependent upon the funding status of the Plan. The Plan makes no distinction between overfunded, fully funded, and underfunded Plan status. Given the plain language of § 10.A.2 and the failure of defendants to produce any contemporaneous evidence that § 10.A.2 was to apply to partial terminations only if the Plan were underfunded, the Court will not read such an intent into § 10.A.2. The Court concludes that § 10.A.2 was intended to apply to partial terminations regardless of the level of Plan funding. Furthermore, the underlying problem on which Creed's analysis is premised--potentially illegal reversions to Gulf upon a partial termination--does not exist if, as the Court finds in part III.B.2.(b)(3), infra, no surplus assets are distributable under § 10.A.2 upon a partial termination.

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[45] Creed also opined that the language of the first paragraph of § 10.A.2 stating that "[u]pon termination of the Plan the rights of members to the benefits accrued under the Plan to the date of such termination, to the extent then funded, shall be nonforfeitable" implied that the partial termination remedy is only available if the Plan is underfunded. However, this language is merely a restatement of the remedial language of Code § 411(d)(3). That statute does not say that plan benefits become nonforfeitable only in the event the plan is underfunded at time of partial termination--it merely says that you cannot vest a member in Plan assets that do not exist.

(2) Does § 18.d of the Chevron Retirement Plan Bar Plaintiffs' Claims to Surplus Gulf Plan Assets?

Defendants argue that because § 10.A.2 of the Gulf Plan was amended by § 18.d of the Chevron Retirement Plan, plaintiffs have no right to any surplus Gulf Plan assets. Section 18.d expressly states that upon a plan termination surplus assets are to revert to Chevron.

> Any residual assets of the Trust Fund remaining after such allocation shall be distributed to the Participating Companies if (i) all liabilities of the Plan for the accrued benefits of the Members, spouses, joint pensioners and Beneficiaries who have an interest in the Plan have been satisfied and (ii) such a distribution does not contravene any provision of law. (Defendants' Ex. 21 at p. 41)

Plaintiffs reply that § 18.d is invalid with regard to Gulf Plan assets for three reasons. First, plaintiffs contend that § 18.d violates ERISA's exclusive benefit rule, § 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1), and Code § 401(a). Second, they contend that the merger of the Gulf and Chevron plans was illegal under the plan merger rules § 208 of ERISA, 29 U.S.C. § 1058. Finally, plaintiffs contend that § 18.d contravenes the A&B Plan, the CRP, and the SAP, which state that all plan assets are to be used for the exclusive benefit of participants and that all contributions are to be irrevocable. The Court will address each of these arguments to determine whether § 18.d bars plaintiffs' claims to surplus Gulf Plan assets.

(a) Validity of § 18.d Under ERISA's Exclusive Benefit Rule

Prior to ERISA the common law of trusts allowed employers to retain surplus assets. Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co., 555 F. Supp. 257, 260 (D.D.C. 1983), aff'd, 729 F.2d 863 (D.C. Cir.1984). At common law when a trust had fully performed its purpose without exhausting the trust estate, a resulting trust arose by operation of law for the benefit of the creator of the trust unless he had manifested a different intention. Pollock v. Castrovinci, 476 F. Supp. 606, 616 (S.D.N.Y. 1979), aff'd mem., 622 F.2d 575 (2d Cir.1980); Wilson v. Bluefield Supply Co., 819 F.2d 457, 464 (4th Cir.1987). Under ERISA employers may recapture surplus assets or amend plans to permit a reversion of such assets as long as the reversion does not violate ERISA and is not prohibited by the plan's language. Wright v. Nimmons, 641 F. Supp. 1391, 1406 (S.D. Tex. 1986); Washington-Baltimore Newspaper Guild, 555 F. Supp. at 259. Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1), sets forth the general rule regarding the use and purpose of pension plan assets. Known as the exclusive benefit rule, this section states in pertinent part:

> Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to the termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Despite its "exclusive benefit" language concerning the use of plan assets, § 403 of ERISA does not prohibit employer reversions. Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1), outlines the circumstances under which employers may recapture surplus assets:

> [A]ny residual assets of a single-employer plan may be distributed to the employer if--
>
> > (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
> >
> > (B) the distribution does not contravene any provision of law, and
> >
> > (C) the plan provides for such a distribution in these circumstances.

Allowing an employer to recover surplus assets if these conditions are met is consistent with the policies underlying ERISA.

> Employers will continue to fund their plans under ERISA guidelines, but will not be penalized for overfunding in "an abundance of caution" or as a result of a miscalculation on the part of an actuary. Thus, employees will continue to be protected to the extent of their specific benefits, but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis.

In re C.D. Moyer Co. Trust Fund, 441 F. Supp. 1128, 1132-33 (E.D. Pa. 1977), aff'd, 582 F.2d 1273 (3d Cir.1978); Washington-Baltimore Newspaper Guild, 555 F. Supp. at 260.

Consistent with § 4044(d) of ERISA, Code § 401(a)(2) allows a plan to qualify if it prohibits diversion of plan assets prior to the satisfaction of employees' liabilities.

These statutes "are clearly intended to ensure that while an employer is obligated to provide defined benefits to plan participants, the participants should not be able to claim a windfall stemming from the employer's accidental overfunding of a defined benefit plan." Washington-Baltimore Newspaper Guild, 555 F. Supp. at 260. See Pollock, 476 F. Supp. at 612-613. The Court therefore concludes that § 18.d of the Chevron Retirement Plan does not violate ERISA's exclusive benefit rule.

(b) Validity of the 1986 Plan Merger Under § 208 of ERISA

Plaintiffs argue that before the 1986 merger of the Gulf and Chevron plans, Gulf Plan participants would have received surplus Plan assets upon a termination of the Gulf Plan. After the merger, however, § 18.d expressly provided that any residual assets would revert to Chevron. According to plaintiffs, § 18.d therefore violates § 208 of ERISA because under § 18.d plaintiffs would not receive everything they would have received had the Gulf Plan terminated immediately prior to the 1986 plan merger. Section 208 of ERISA, 29 U.S.C. § 1058, provides in relevant part:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to

> receive immediately before the merger, consolidation, or transfer (if the plan had been terminated).

Code § 414(l) sets forth a similar rule for plan qualification.

Under these statutes the benefits a plan participant would have received prior to a merger, upon a hypothetical plan termination, must be at least equivalent to the benefits the plan participant would receive after the merger, upon a hypothetical plan termination. Treasury Regulations promulgated pursuant to § 208 of ERISA limit the protections afforded by § 208 to accrued benefits, and provide that benefits other than accrued benefits may be modified, reduced, or eliminated in a plan merger without violating § 208 of ERISA or Code § 414(l). Treas.Reg. § 1.414(1)-1(e)(1) states:

> Section 414(1) compares the benefits on a termination basis before and after the merger. If the sum of the assets of all plans is not less than the sum of the present values of the accrued benefits (whether or not vested) of all plans, the requirements of section 414(1) will be satisfied merely by combining the assets and preserving each participant's accrued benefits. This is so because all the accrued benefits of the plan as merged are provided on a termination basis by the plan as merged. However, if the sum of the assets of all plans is less than the sum of the present values of the accrued benefits (whether or not vested) in all plans, the accrued benefits in the plan as merged are

> not provided on a termination basis. (emphasis added)[46]

Plaintiffs concede that an entitlement to the actuarial surplus that may exist at any given time in an ongoing pension plan is not an "accrued benefit" for the purposes of regulations promulgated pursuant to § 208 of ERISA. (E.g., Plaintiffs' Corrected Trial Brief at pp. 87-88) Accord, Van Orman v. American Insurance Co., 608 F. Supp. 13, 25-26 (D.N.J.1984) ("Van Orman II"); Walsh v. Great Atlantic & Pacific Tea Co., 96 F.R.D. 632, 651-52 (D.N.J.), aff'd, 726 F.2d 956 (3d Cir.1983). The Court therefore concludes that the merger of the Gulf and Chevron Plans did not violate § 208 of ERISA or IRS regulations governing plan mergers.[47]

(c) Validity of § 18.d Under the A&B Plan, the CRP and the SAP

Whether a pension plan permits a reversionary amendment turns on the documents creating the plan. Bryant v. International Fruit Products Co., 793 F.2d 118, 123 (6th Cir.), cert. denied, 479 U.S. 986, 107 S.Ct. 576, 93 L.Ed.2d 579 (1986); Wilson v. Bluefield Supply Co., 650 F. Supp. 578, 581 (S.D. W. Va. 1986), aff'd, 819 F.2d 457 (4th Cir.1987). Because the three plans that were amended and restated as the Gulf Plan were not a single ERISA plan, the Court must analyze the validity of § 18.d of the Chevron Retirement Plan in light of the language of each of these plans. Even had the

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[46] In contrast to the horizontal partial termination rule, discussed supra, this regulation is another instance where the IRS chose the term "accrued benefits."

[47] Plaintiffs also argue that § 18.d violates § 10.D of the Gulf Pension Plan. (Defendants' Ex. 29 at pp. 47-48) However, § 10.D is merely a restatement of the language contained in § 208 of ERISA and Code § 414(l), and the Court rejects this argument for the reasons discussed above.

three plans been merged into a single ERISA plan in 1975, the same analysis would be required since the three plans had previously been administered separately. See Bryant, 793 F.2d at 122-23 (Court examined 1959 plan and trust instruments to determine the legality of a 1982 reversion amendment). This analysis requires the Court to review the language of each plan and its constituent trust agreement to determine whether they (1) allowed a reversion by Gulf, and (2) reserved to Gulf the right to later amend the plan to allow a reversion.

(i) The A&B Plan

Plaintiffs argue that § 10 of the 1944 A&B Plan prohibited both employer reversions and reversionary amendments by stating that all employer contributions were to be "irrevocable" and would be used for the "exclusive benefit" of plan participants. Section 10 provided in pertinent part:

> Section 10. Provision for Agreement of Trust
>
> In order further to implement the Plan the Corporation has entered into an Agreement of Trust to the end that such funds, as may be irrevocably contributed from time to time for the payment of all or any part of the annuities under the Plan, shall be segregated from the Corporation's own assets and held in trust for the exclusive benefit of the participants, retired participants or their beneficiaries under the Plan who may in accordance with the terms of such Agreement of Trust be entitled to participate thereunder. To the extent that reserves are provided under such a trust fund to cover all or part of the benefits under this Plan, the payment of such benefits shall be a charge

> against the Trust Fund and only the remaining part, if any, of such benefits shall be charged directly to the Corporation. (Plaintiffs' Ex. 448 at p. 11) (emphasis added)
>
> . . . .

However, §§ 1 and 9 of the accompanying trust agreement created an implied reversion of surplus plan assets to Gulf.

> . . . Any and all contributions made by the Corporation shall be irrevocable and no part of the corpus of the Fund nor any income therefrom shall at any time prior to the satisfaction of all liabilities under the Plan revert to the Corporation or be used for or diverted to purposes other than for the exclusive benefit of participants, retired participants or their beneficiaries under the Plan. (A&B Plan Agreement of Trust, § 1, Plaintiffs' Ex. 448 at p. 24) (emphasis added)
>
> . . . .
>
> In no event shall any part of the corpus of the Fund or any income therefrom at any time prior to the satisfaction of all liabilities under the Plan revert to the Corporation or be used for or diverted to purposes other than for the exclusive benefit of participants, retired participants or their beneficiaries under the Plan. (A&B Plan Agreement of Trust, § 9, Plaintiffs' Ex. 448 at p. 33) (emphasis added)

In 1975 when the A&B Plan was amended and restated as the Gulf Pension Plan, Gulf's implied right of reversion was preserved in § 10.A.2, which stated in the last paragraph:

> In no event shall any part of the Plan assets held in trust or any income on it, prior to the satisfaction of all liabilities under the Plan, revert to the Company or be used other than for the members, pensioners, spouses, beneficiaries and joint pensioners. (Defendants' Ex. 29 at p. 45) (emphasis added)

Similar language appeared in the first paragraph of § 10.A.2.

The original A&B trust agreement gave Gulf unilateral power to amend the plan and the trust agreement and did not prohibit an amendment that would allow a reversion to Gulf.

> Section 10. Amendment of Trust Agreement or Plan
>
> Subject to the provisions hereinafter set forth in this Section 10, the Corporation reserves for itself and its successors the right, at any time and from time to time, by action of its Board of Directors (or the Board of Directors of such successors) to modify or amend, in whole or in part, any or all of the provisions of this Agreement of Trust and of the Plan. All such modifications or amendments relating to classification of employees, contributions or benefits shall be uniform in their nature and application shall be applied to all those similarly situated . . .

(A&B Plan Agreement of Trust, Plaintiffs' Ex. 448 at pp. 34-35)

This amendment authority was confirmed in § 8 of the Plan.

> The Board of Directors shall have the right, at any time, to withdraw or modify this Plan. The Corporation guarantees that once an annuity has accrued and has been granted by the Annuity Committee as a regular allowance, it will be continued for the life of the annuitant or his beneficiary nominated in accordance with the provisions of Section 5(3), subject, however, to the provisions of this Plan as it is in effect at the time such annuity is granted. (Plaintiffs' Ex. 448 at p. 10)

Notwithstanding the implied right of reversion of surplus assets and the absence of any prohibition of an amendment allowing such a reversion, plaintiffs argue that amendments allowing reversions to Gulf were prohibited by exclusive benefit language found in the amendment provisions of the 1961 amended A&B Plan and the 1975 Gulf Plan. Sections 11(8) and (9) of the 1961 A&B Plan stated:

> (8) The Board of Directors reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan, provided that:
>
> (a) No modification or amendment may be made which will deprive any person of any benefit under the Plan which has accrued on or prior to the

time of such modification or amendment, and

(b) No such modification or amendment shall make it possible for any part of the Trust Fund to be used for, or diverted to, purposes other than for the exclusive benefit of participants and retired participants, or their beneficiaries under the Plan.

. . .

(9) . . .

In no event shall any part of the corpus of the Trust Fund or any income therefrom at any time prior to the satisfaction of all liabilities under the Plan revert to the Corporation or be used for or diverted to purposes other than for the exclusive benefit of participants, retired participants or their beneficiaries under the Plan. (Plaintiffs' Ex. 449 at p. 10) (emphasis added)

Section 9.9 of the 1975 Gulf Pension Plan did not substantially change the amendment authority of the 1961 amended A&B Plan. It stated:

(9) Right of Amendment

The Company reserves the right to modify or amend the Plan, in whole or part, provided that:

(a) No modification or amendment may deprive any member or other person of any benefits accrued to date, and

(b) No modification or amendment shall allow any Plan assets to be used for, or diverted to, purposes other than the exclusive benefit of the members, pensioners, spouses and other joint pensioners and beneficiaries. (Defendants' Ex. 29 at p. 41)

If ERISA or the Code do not bar a contemplated asset distribution, judicial review of plan language concerning such a distribution is guided by general principles of contract construction. Although a minority of courts have held that the inclusion of "exclusive benefit" language such as in the A&B Plan of the Gulf Plan prohibits an employer's recapture of surplus assets, the majority of courts, including this Court, has held that exclusive benefit language is mandated by ERISA and the Code and that standing alone it cannot be read to prohibit a reversion of surplus assets. See Wright, 641 F. Supp. at 1406; Chait v. Bernstein, 835 F.2d 1017 (3d Cir.1987); Pollock, 476 F. Supp. at 612, 617.[48] The mere recitation of exclusive benefit language does not "represent a unique expression of its designers' desire to mandate that every penny, even amounts in excess of accrued benefits, must revert to employees." Chait, 835 F.2d at 1023. Rather, such language

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[48] Although ERISA was not enacted until 1974, long after the 1944 A&B plan, the original predecessor of current Code § 401(a), § 165(a) of the Internal Revenue Code of 1939, contained similar "exclusive benefit" language. See IRS General Counsel Memorandum 35351, May 29, 1973, at p. 3.

is standard language in every ERISA plan and merely rescribes the language of ERISA and the Code. Id.

A court must therefore look for additional language reflecting the employer's intent in using exclusive benefit language. A significant factor in determining the employer's intent in using such language is whether the plan contained a provision for the distribution of surplus assets to participants before the challenged amendment. Wright, 641 F. Supp. at 1406. Another factor is employer communications about asset distributions. While such communications are not part of the plan and cannot be used to modify plan provisions, they do provide an indication of the employer's intent. Bryant, 793 F.2d at 123.

In addition to the exclusive benefit language, the A&B Plan stated that all employer contributions would be "irrevocable." This language is not boiler plate required either by ERISA or Code § 401(a) and is relevant in discerning Gulf's intent. While the predecessor to § 401(a) may have mandated the exclusive benefit language of the A&B Plan, it did not require that employer contributions to a plan must be irrevocable. The legislative history of § 401(a) reflects that Congress expressly considered and rejected an irrevocability requirement for qualified plan status. See IRS General Counsel Memorandum 35351, May 29, 1973, at p. 4. Nor, as defendants argue, was the "irrevocable contribution" language of the A&B Plan required by Treas.Reg. § 1.404(a)-2(a)(2). This regulation, entitled "Information to be furnished by employer claiming deductions . . ." merely lists the information that an employer must furnish the IRS in the first taxable year in which a deduction is taken in order to justify the deduction. The regulation imposes no substantive requirements on the contents of the plan. See IRS Technical Advice Memorandum

7002206860A, February 20, 1970 (National Office of the IRS rejects use by a district office of § 1.404(a)-2 for substantive support).

Nevertheless, the Court finds that the "irrevocable" language in the A&B Plan did not prohibit a Plan amendment allowing a reversion to Gulf. At common law a trust is irrevocable if the written instrument creating the trust was adopted by the settlor as the complete expression of his intent and did not allow the settlor to revoke the trust. RESTATEMENT (SECOND) OF TRUSTS § 330, Comment b (1959). Conversely, where the settlor reserved a power of revocation in the terms of the trust, he could revoke the trust in the manner and to the extent that he reserved such a power. A. Scott & W. Fratcher, THE LAW OF TRUSTS, § 330 (4th ed. 1987). The intention to reserve a power of revocation need not be stated in exact terms; it may be indirectly expressed or inferred from plan language. Id. at § 330.1. A statement that the trust is intended to be irrevocable will control to prohibit revocation unless this term is contradicted by other terms of the trust. G.G. Bogert & G.T. Bogert, TRUSTS & TRUSTEES, § 1000 (2d ed. 1983). If the meaning of the trust instruments' language is uncertain or ambiguous as to whether the settlor intended to reserve a power of revocation, evidence of the circumstances under which the trust was created can be used to determine its interpretation. RESTATEMENT (SECOND) OF TRUSTS § 330, Comment b (1959).

The A&B Plan contained conflicting language about revocation. Although the plan and trust language cited by plaintiffs stated that all Gulf contributions were "irrevocable," that language was contradicted by §§ 1 and 9 of the Agreement of Trust in which Gulf impliedly reserved the right to take a reversion of surplus assets. The most logical way to harmonize this apparent conflict, and to give meaning to all of these provisions, is to conclude that Gulf intended that it could not

withdraw its contributions from the trust until all plan liabilities had been satisfied. The circumstances surrounding the creation of the A&B Plan and Agreement of Trust also indicate that the "irrevocable" language was not intended to prohibit a reversion by Gulf. Although the A&B Plan and the CRP and SAP all contained "irrevocable" language, there were material differences in the context in which this language appeared. Unlike the irrevocable language in the CRP and SAP, discussed infra, the irrevocable language in the A&B Plan and Agreement of Trust was accompanied by language, sometimes in the following sentence, implying a right of reversion to Gulf after all Plan liabilities had been satisfied.[49] Also, unlike the CRP and SAP, no version of the A&B Plan ever contained a schedule for distributing surplus assets to plan participants.

The Court does not find, as urged by plaintiffs, that § 14.4 of the 1976 Agreement of Trust (Plaintiffs' Ex. 390 at p. 19), which then governed only the A&B portion of the Gulf Pension Plan, required that surplus assets be distributed to Plan participants. That provision merely instructed the trustee that if the Plan were silent as to the distributions to be made upon a termination, or if the terms of the Plan were inconsistent with then applicable law, the trustee "shall distribute the Fund to the participants and their beneficiaries in an equitable manner that will not adversely affect the qualified status of the Plan [and will be legal]." The Court finds that this provision was intended to give the trustee authority to completely distribute

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[49] Compare § 10 of the A&B Plan (Plaintiffs' Ex. 448 at p. 11) and §§ 1 and 9 of the A&B Plan Agreement of Trust (Plaintiffs' Ex. 448 at pp. 24 and 45) with Article II of the ESP Agreement of Trust and CRP Amended Agreement of Trust (Plaintiffs' Exs. 428 at p. 36 and 441 at p. 6) and § 7 of the SAP and Article II of the SAP Agreement of Trust (Plaintiffs' Ex. 409 at pp. 11 and 16-17).

assets in an equitable manner upon a Plan termination if the Plan itself gave the trustee no guidance, or if that guidance was then unlawful.

Also, unlike the CRP, discussed infra, no evidence was presented of communication to Gulf employees regarding their right to surplus assets from the A&B Plan or the Gulf Plan.[50] The Court is not persuaded by plaintiffs' argument that Gulf's intent to prohibit both reversions and reversionary amendments is evidenced by language in the Gulf Pension Plan Summary Plan Descriptions (SPDs). The September 1, 1982, SPD, which was the last summary provided to participants prior to the July 1, 1986, merger, stated:

> The Company has the right to change the plan. But if it does, you should know that . . . it cannot make any change that would allow the assets of the Plan to be used for anything but the exclusive benefit of members or their beneficiaries . . . . If the Company should ever terminate the Plan, the procedures in § 10 of the Plan will control who will get what from the trust assets. (Plaintiffs' Ex. 425 at p. 21) (emphasis in original)

Earlier SPDs use the same language. (E.g., Plaintiffs' Ex. 424, 1977 SPD at p. 21) This language is a restatement of the exclusive benefit language of the A&B Plan, the Agreement of Trust, and § 8.C of the Gulf Plan. (The only other communication from Gulf relied upon by plaintiffs-- a May 3,

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[50] The significance of this should not be understated. No ox was muzzled in this case. See Deuteronomy 25:4. Some of the best lawyers in America have spent four years gleaning every fact and inference from Gulf's plans and communications about them.

1984, letter from Gulf to plan participants [Plaintiffs' Ex. 505]-- merely says that the merger with Chevron will not jeopardize accrued benefits.) Exclusive benefit language in a plan standing alone does not prohibit either reversions or reversionary amendments. Likewise, SPD language that merely paraphrases such a plan provision does not evidence Gulf's intent not to allow reversions or reversionary amendments. For the reasons discussed in part III.B.2.b.(3), infra, the Court also concludes that the reference in the SPD to "the procedures in § 10 of the Plan" does not reflect Gulf's intent that surplus assets be distributed to Plan participants.

Were the language of the Gulf Pension Plan free from doubt this lawsuit probably would not have consumed the time devoted to it by the litigants and the Court. Having carefully weighed the arguments of plaintiffs and defendants, the Court concludes that the Gulf Pension Plan, and its predecessor, the A&B Plan, did not prohibit the amendment allowing the right of reversion contained in paragraph 18.d of the Chevron Retirement Plan. Although the Court is somewhat troubled by the use of the word "irrevocable" in the A&B Plan and Agreement of Trust, the Court is nevertheless led to this conclusion because (1) the A&B Plan and the Gulf Plan and their accompanying trust agreements have always contained an implied right of a reversion to Gulf of surplus assets after all plan liabilities were satisfied, (2) these plans and trust agreements never prohibited an amendment allowing a reversion to Gulf, (3) unlike the CRP and SAP, no version of the A&B Plan ever contained a schedule or other provision for distributing residual assets to Plan participants, and (4) unlike the CRP and SAP, all contributions to the A&B Plan were made by Gulf.

This construction of the Gulf Plan is consistent with the policies underlying ERISA. It guarantees that the plaintiffs will receive all benefits accrued under the A&B Plan and the Gulf

Plan. However, it also allows the employer, which made all of the plan contributions, to recover any remaining surplus after all plan liabilities have been satisfied. A contrary construction could deter employers from fully funding plans, or from erring on the side of plan members in making funding projections, out of fear that the penalty for making a mistake in funding calculations would be to forego an eventual right to receive any surplus upon termination of the plan. This consideration should not be understated. Underfunded pension plans can seriously prejudice members' rights to receive benefits provided to them by the plan and, even when those benefits are insured, can require the Pension Benefit Guaranty Corporation, and ultimately the taxpayers, to assume responsibility for them. From a policy standpoint, allowing an employer to obtain a reversion of a surplus attributable to overfunding is a better alternative, especially since as discussed in part II.B.3(a), supra, the substantial excise tax on reversions deters employers from terminating plans and taking reversions.

(ii) The CRP

Plaintiffs argue that in § 8 of the ESP, Article II of the accompanying ESP Agreement of Trust, and Article II of the CRP Amended Agreement of Trust made all CRP contributions irrevocable and prohibited reversions of surplus assets to Gulf. These provisions stated in pertinent part:

> In order to further implement the Plan the Corporation has entered into an Agreement of Trust with a corporate trustee to the end that the assets of each Fund of the Plan shall separately be held in trust for the exclusive benefit of members and annuitants, or their beneficiaries and contingent annuitants, who may in accordance with the provisions of the

> Plan be entitled to participate thereunder . . . (ESP § 8, Plaintiffs' Ex. 428 at p. 17) (emphasis added)
>
> . . .
>
> . . . Any and all contributions made by The Gulf Companies to the Annuity Fund and each Stock Bonus Fund shall be irrevocable, and no part of the corpus of any Fund, or any income therefrom or accretions thereto, shall revert to The Gulf Companies or be used for or diverted to purposes other than those provided for in the Plan. . . . (ESP Agreement of Trust, Article II, Plaintiffs' Ex. 428 at p. 36) (emphasis added)
>
> . . .
>
> . . . Any and all contributions made by The Gulf Companies to the Annuity Fund and each Stock Bonus Fund shall be irrevocable, and no part of the corpus of any Fund, or any income therefrom or accretions thereto, shall revert to The Gulf Companies or be used for or diverted to purposes other than those provided for in the related Plan. . . . (CRP Amended Agreement of Trust, Article II, Plaintiffs' Ex. 441 at p. 6) (emphasis added)

In contrast to the A&B Plan, the ESP and CRP contained schedules for the distribution of all assets, including any surplus assets, to plan participants and beneficiaries upon a complete plan termination.

(6) The Board of Directors may terminate the Plan for any reason at any time. In the case of termination of the Plan, the cash, securities and properties then held in the Funds of the Plan shall be used for the exclusive benefit of the members and annuitants, or their beneficiaries and contingent annuitants. In such event, the share of each such person in the assets of each Fund of the Plan, i.e., the investments and cash held therein, shall be computed and distributed as follows:

(a) The investments and cash held in the Annuity Fund shall be allocated as follows:

. . .

Fourth, the remaining balance in the Fund, if there is any after the distributions under First, Second and Third above, shall be divided among members and annuitants (including contingent annuitants in receipt of annuities) in the proportion which the amounts credited to each, under First, Second and Third above, bears to the total of the amounts credited to all such persons under First, Second and Third above. (ESP § 9(6), Plaintiffs' Ex. 428 at pp. 19 & 20)

. . .

A. Plan Termination

> The Board of Directors may terminate the Plan for any reason at any time. Upon termination of the Plan, all the Plan assets, after provisions for any properly chargeable expenses, shall be used solely for the members, annuitants, beneficiaries and joint annuitants. . . . [and] the assets shall be allocated as follows:
>
> . . .
>
> Third, the remaining balance shall be divided among members, annuitants, and joint annuitants receiving annuities, in the ratio of the amount credited to each under FIRST and SECOND above bears to the total of these amounts credited to all such persons. (CRP § 7, Plaintiffs' Ex. 429 at p. 22)

Plaintiffs also argue that Gulf's intent to prohibit reversionary amendments to the CRP is evidenced by the ESP and CRP amendment authority provisions.

> (5) The Board of Directors reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan, provided that;
>
> (a) No modification or amendment may be made which will deprive any

> member or other person of any benefits which have accrued on or prior to the time of such modification or amendment, and
>
> (b) No such modification or amendment shall make it possible for any part of the Funds of the Plan to be used for, or diverted to, purposes other than for the exclusive benefit of members and annuitants, or their beneficiaries and continuant annuitants. (ESP § 9, Plaintiffs' Ex. 428 at pp. 18-19)

The same language was present in § 6 of the CRP, Plaintiffs' Ex. 429 at p. 22.

The features of the ESP were reiterated in the Questions and Answers that Gulf included in the ESP booklet "as a convenient aid to its understanding." (Plaintiffs' Ex. 428 at p. 22) Questions and Answers 19 and 52 stated:

> 19.Q. Are the contributions which will be made by The Gulf Companies irrevocable?
>
> A. Yes. All contributions made by The Gulf Companies to the Annuity Fund and to each Stock Bonus Fund will be irrevocable, and no part of the corpus of any Fund or any income therefrom or accretions thereto, will revert to The Gulf Companies or be used or diverted to purposes other than those provided for in the Plan. (ESP, Questions & Answers, Plaintiffs' Ex. 428 at p. 25)

. . .

52.Q. Can the Plan be amended or terminated?

A. Yes. The Board of Directors may amend or terminate the Plan at any time. However, no modification or amendment may be made which will deprive any member or other person of any benefits which have accrued on or prior to the time of such modification or amendment, and no such modification or amendment shall make it possible for any part of the Funds of the Plan to be used for, or diverted to, purposes other than for the exclusive benefit of members and annuitants, or their beneficiaries and contingent annuitants; and in the case of termination of the Plan, the cash, securities, and properties then held in the Funds of the Plan shall be used for the exclusive benefit of the members and annuitants, or their beneficiaries and contingent annuitants. (ESP, Questions & Answers, Plaintiffs' Ex. 428 at p. 34)[51]

Like the A&B Plan, the ESP and CKP stated that employer contributions were to be "irrevocable" and that plan assets were to be used solely for the "exclusive benefit" of plan participants, and reserved the right of Gulf to amend the plan.

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[51] A 1962 preliminary report on the ESP (Defendants' Ex. 314 at paragraph 5) also stated that "[u]nlike the Annuities and Benefits Plan none of the assets of the [ESP] can ever revert to the Corporation."

However, unlike the A&B Plan, the ESP and CRP (1) contained no language impliedly reserving a right of reversion by Gulf, (2) barred an amendment that would permit a reversion to Gulf, and (3) allocated surplus assets to plan participants upon a complete plan termination.

Defendants respond that assuming arguendo that the original ESP and CRP prohibited reversions and reversionary amendments, such a right was nevertheless provided in the 1974 amended CRP. Section 7.2 of the 1974 Amended CRP deleted the earlier language that allocated any surplus to plan participants and substituted the following language:

> A. Plan Termination
>
> 1. Right of termination. The Board of Directors may terminate the Plan for any reason at any time and in such case neither the Company nor any other of The Gulf Companies shall be liable to make any further payments to the Annuity Fund or otherwise except to the extent, if any, required to fulfill the guarantees described in Section 7.
>
> 2. Distribution of assets. Upon termination of the Plan all of the assets in the Annuity Fund, after provision for any properly chargeable expenses, shall be used solely for the members, annuitants, beneficiaries and joint annuitants, until all liabilities under the Plan shall have been satisfied in full . . .
>
> In no event shall any part of the Annuity Fund or any income on it, prior to the

> satisfaction of all liabilities under the Plan, revert to the Company or be used other than for the members, annuitants, beneficiaries and joint annuitants. (Plaintiffs' Ex. 439 at pp. 63-64) (emphasis added)

The Court is not persuaded by defendants' argument. Even after this amendment, the CRP trust agreement still stated that all contributions were irrevocable and that no trust assets could revert to Gulf. (CRP Amended Agreement of Trust, Article II; Plaintiffs' Ex. 441 at p. 6) This language was not deleted from the CRP trust agreement until 1976, when it was amended to adopt the language similar to the Master Trust Agreement of the Gulf Pension Plan, which did not require that contributions be irrevocable. (CRP Agreement of Trust as amended October 8, 1976, § 2.6, Plaintiffs' Ex. 443 at pp. 3-4)

Also, despite the fact that the CRP was amended in 1974 and the CRP trust agreement was amended in 1976 to include implied reversion language similar to that of the Gulf Plan and to delete the "irrevocable" language, under the original terms of the CRP and trust no right of reversion was reserved by Gulf. Changes in 1974 and 1976 could not create a right of reversion in the face of explicit language of the ESP and CRP trust agreements that trust funds were irrevocable and could not revert to Gulf. In fact, paragraph 3 of the 1976 amended Agreement of Trust stated that "[t]his Amendment and Restatement shall not increase or decrease any rights an employee may have had under the prior Trust, as amended." (Plaintiffs' Ex. 443 at p. 2)

Furthermore, even assuming arguendo that Gulf had a right of reversion after the 1974 amendment to the CRP or the 1976 amendment to the CRP trust agreement, that right would only apply to a surplus due to future employer contributions to the CRP trust. Gulf had no right to the CRP assets at the time of

the amendment because those assets existed before the CRP or its trust agreement contained any implied right of reversion. See Audio Fidelity Corp. v. Pension Benefit Guaranty Corp., 624 F.2d 513, 517 (4th Cir.1980). Although defendants presented evidence that Gulf's actuaries recommended that Gulf make additional contributions to the CRP after 1970, when employee contributions ceased, defendants offered no evidence at trial that Gulf actually made any contributions to the CRP (or SAP) after 1970. Based upon an extensive analysis of the reports of Gulf's actuaries and the IRS Form 5500's filed by Gulf and Chevron (see, e.g., Plaintiffs' Ex. 1330), which the Court finds persuasive, Dreher testified that it was highly unlikely that such contributions were ever made by Gulf.

Lastly, defendants argue that despite the language of the CRP and its trust agreements, the last paragraph of § 10.A.2 of the 1975 Gulf Pension Plan amended the CRP (and the SAP) to afford Gulf a right of reversion, and that the "irrevocable" language in the CRP and SAP trust agreements was deleted when these trusts became part of the "Master" Trust Agreement of the Gulf Pension Plan in 1979. The Court is not persuaded by these arguments for two reasons. First, neither § 10.A.2 nor the 1979 Master Trust Agreement could create a right of reversion because under the original terms of the CRP and SAP no right to revert trust contributions was reserved by Gulf. Second, even if Gulf had a right of reversion after 1975 or 1979, that right would only apply to a surplus due to subsequent Gulf contributions to the CRP or SAP, and there is no evidence that Gulf made contributions to the CRP or SAP after 1970.

While precedent is of limited value because the construction of a plan turns primarily on its unique language, two cases involving analogous plan language support the Court's conclusion that Gulf and Chevron could not amend the Gulf Plan to obtain a reversion of CRP or SAP assets. In Re Reevie & Montreal Trust Co., 25 D.L.R. 4th 312

(Ont.App.1986), the Court analyzed language in a Canada Dry pension plan very similar to the language of the CRP and SAP. Like these plans, all contributions to the Canada Dry plan were irrevocable and the employer reserved the right to amend the plan. Section 11.1 of the original Canada Dry plan adopted in 1973 stated in pertinent part:

> While it is the intention and hope of the Company to make contributions regularly and build up a reserve fund sufficient to provide all of the benefits contemplated under the Plan, the Company does not assume a contractual obligation to continue its contributions. It reserves the right to change, modify, suspend or discontinue the Plan, or reduce its contributions. (emphasis added)
>
> . . .
>
> However, all Contributions made by the Company are irrevocable and, together with all Contributions made by Members, may only be used exclusively for the benefit of Members, Retired Members, Eligible Spouses, Contingent Annuitants or their Beneficiaries. (emphasis added)
>
> . . .
>
> If the Company should discontinue the Plan, Contributions made by the Company cannot be withdrawn, but must remain in the Trust Fund. In such event the Trust Fund shall be distributed among the Members . . . in an equitable manner determined by the [plan administrator] . . .

Id. at 314. In 1981 § 11.1 was amended to delete the "irrevocable" language and § 11.4 was added to provide:

> Upon termination of the whole plan, any assets held by the Trustees remaining after full provision has been made for the accrued retirement income and other benefits as described in Section 11.1 may be used to increase benefits described in Section 11.1 in such manner as the Company, in its discretion, shall determine, subject to the provisions of Section 12.1. Any assets still remaining shall be returned to the Company.

Id. at 315. In a suit over the employer's right to revert surplus plan assets, the Court observed:

> At the centre of this dispute lies the simple fact that the funds in dispute are trust funds. The settlors of the fund were the employer (Canada Dry Limited) and the employees. The pension plan and the trust agreement provide that the contributions were irrevocable and that the beneficiaries of the trust were the members of the pension plan (i.e., the employees, spouses, etc.).

Id. at 317. Because in the original plan the employer had stated that trust assets were irrevocable and that upon the plan termination all assets would be distributed among the plan members, the Court held that, notwithstanding the broad amendatory power contained in the original plan, the employer could not exercise that amendatory power to create a reversion of surplus funds to itself. Id. at 317-18.

In Bryant v. International Fruit Products Co., 793 F.2d 118 (6th Cir.), cert. denied, 479 U.S. 986, 107 S.Ct. 576, 93 L.Ed.2d 579 (1986), although the original plan did not provide for allocation of any post-termination surplus among plan members, the plan's amendatory language stated that "no such amendment shall cause or permit any part of the Trust Estate to revert to or be repaid to the Employer or be diverted to any purpose other than the exclusive benefit of the participants or their beneficiaries or estate . . ." Id. at 120. The Sixth Circuit held that this provision went beyond traditional ERISA exclusive benefit language and prohibited a subsequent amendment allowing an employer reversion. Although the amendatory language in the CRP and SAP is not as strict as the amendatory language of the International Fruit Products plan, Gulf's interpretation of the CRP amendatory language in Answer 52, when read in tandem with the CRP and SAP provisions allocating surplus assets to participants upon a complete plan termination, leads to the same holding as in Bryant.

The Court concludes that the CRP prohibited both reversions and reversionary amendments and that § 18.d is therefore invalid as to that part of the Gulf Pension Plan surplus attributable to the CRP.

(iii) The SAP

Like the CRP, the SAP and its trust agreement (1) contained "irrevocable" and "exclusive benefit" language, but no language impliedly allowing a reversion to Gulf, (2) barred an amendment that would allow such a reversion, and (3) allocated surplus assets to plan participants upon a complete plan termination. Section 7 of the SAP and Article II of its accompanying Agreement of Trust made all contributions to the SAP irrevocable and prohibited reversions to Gulf and precluded Gulf from amending the SAP to allow a reversion.

In order to implement the Plan, Mene Grande Oil Company has entered into an Agreement of Trust with a corporate trustee so that the contributions of the participants in such funds as the Participating Companies may contribute irrevocably from time to time for the payment of all or any part of the benefits under the Plan shall be segregated from the assets of the Participating Companies and held in trust in the Annuity Fund for the exclusive benefit of participants and annuitants, or their beneficiaries or contingent annuitants, who may be entitled to benefits under the Plan in accordance with the provisions thereof . . . (SAP, § 7, Plaintiffs' Ex. 409 at p. 11) (emphasis added)

. . .

. . . The Fund, together with all income therefrom and all accretions thereto, shall be held by the Trustee in trust hereunder and shall be invested, reinvested and applied by it as hereinafter provided. Any and all contributions made by the Participating Companies to the Annuity Fund shall be irrevocable, and no part of the corpus of the Fund, nor any income therefrom or accretions thereto, shall revert to the Participating Companies or be used for or diverted to purposes other than those provided in the Plan. (SAP Agreement of Trust, Article II, Plaintiffs' Ex. 409 at pp. 16-17) (emphasis added)

Upon a complete plan termination, the SAP provided the following scheme for distributing plan assets:

> (7) The Board of Directors may terminate the Plan for any reason at any time. In the case of termination of the Plan, the assets then held in the Annuity Fund, after provision for any expenses properly chargeable against the Annuity Fund, shall be used for the exclusive benefit of participants and annuitants. In such event, the share of each party shall be computed and distributed, to the extent the assets shall be sufficient, as follows:
>
> . . .
>
> . . .
>
> Third, any balance remaining after the allocations under First and Second above shall be allocated to the participants in proportion to their accumulated contributions. (SAP § 8, Plaintiffs' Ex. 409 at pp. 12-13)[52]

The authority to amend SAP was stated in § 8 of the SAP and § 4.09 of the Agreement of Trust:

> (6) The Board of Directors reserves the right at any time and from time to time to modify or amend, in whole or in part,

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[52] No evidence was presented of communications to employees regarding surplus asset distributions from the SAP.

any or all of the provisions of the Plan, provided that:

(a) No modification or amendment may be made which will deprive any participant or other person without his consent of any benefits under the Plan to which he would otherwise be entitled by reason of accumulated assets held under the Plan at the time of such modification or amendment and

(b) No modification or amendment shall make it possible for any part of the Annuity Fund under the Plan to be used for, or diverted to, purposes other than for the exclusive benefit of participants and annuitants, or their beneficiaries or contingent annuitants. (SAP § 8, Plaintiffs' Ex. 409 at p. 11)

. . .

Subject to the provisions hereinafter set forth in this Section 4.09, Mene Grande Oil Company reserves for itself and its successors the right, at any time and from time to time by action of its Board of Directors (or the Board of Directors of such successors) to modify or amend, in whole or in part, any or all of the provisions of this Agreement and of the Plan. No such modification or amendment shall operate to deprive any participant or other person of any

> benefits which have accrued on or prior to the time of such modification or amendment, except that such modification or amendment may be applied retroactively if the Board of Directors deems it necessary or proper in order to bring the Plan or this Agreement into conformity with any law or governmental regulation relating to plans or trusts of this character. . . .
>
> (SAP Agreement of Trust, § 4.09, Plaintiffs' Ex. 409 at p. 22)

Defendants' responses concerning the SAP mirror their arguments about the CRP. Defendants respond that assuming arguendo that the original SAP language prohibited reversions and reversionary amendments, such a right was nevertheless provided in the 1973 amended SAP. Section 6.7 of the 1973 amended SAP deleted the earlier language that allocated any surplus to plan participants and substituted the following language:

. . .

> Upon termination of the Plan all of the assets in the Annuity Fund, after provision for any properly chargeable expenses, shall be used solely for the members, annuitants, beneficiaries and joint annuitants, until all liabilities under the Plan shall have been satisfied in full. . . .
>
> In no event shall any part of the Annuity Fund or any income on it, prior to the satisfaction of all liabilities under the Plan, revert to the Company or be used other than for the members, annuitants, beneficiaries

and joint annuitants. (SAP § 6.7, Plaintiffs' Ex. 415 at pp. 20-21)

The Court is not persuaded by this argument. Even after this amendment the SAP trust agreement still stated that all contributions were to be irrevocable and that no trust assets could revert to Gulf. (SAP Agreement of Trust, Article II; Plaintiffs' Ex. 409 at pp. 16-17) This language was not deleted from the SAP trust agreement until 1976 when it was amended to adopt language similar to the Master Trust Agreement of the Gulf Pension Plan, which did not require that contributions be irrevocable. (SAP Agreement of Trust as amended October 8, 1976, § 2.6; Plaintiffs' Ex. 419 at pp. 3-4) (The amended SAP Agreement of Trust was identical in all material respects to the 1976 amended CRP Agreement of Trust.)

Also, despite the fact that the SAP was amended in 1973 and the SAP trust agreement was amended in 1976 to include implied reversion language similar to that of the Gulf Plan and to delete the "irrevocable" language, under the original terms of the SAP trust agreement no right of reversion was reserved by Gulf. Changes in 1973 and 1976 could not create a right of reversion in the face of explicit language of the original SAP trust agreement that trust funds were irrevocable and could not revert to Gulf. Like the 1976 amended CRP Agreement of Trust, Paragraph 3 of the 1976 amended SAP Agreement of Trust stated that "[t]his Amendment and Restatement shall not increase or decrease any rights an employee may have had under the prior Trust, as amended." (Plaintiffs' Ex. 419 at p. 2)

Furthermore, assuming arguendo that Gulf had a right of reversion after the 1973 amendment to the SAP or the 1976 amendment to the SAP Agreement of Trust, that right would only apply to a surplus due to future employer contributions to the SAP trust. Gulf had no right to the SAP assets at the time

of the amendment because those assets existed before the SAP or its trust agreement contained any right of reversion, and there was no evidence that Gulf made contributions to the SAP after 1970.

The Court concludes that the SAP prohibited both reversions and reversionary amendments, and that § 18.d is therefore invalid as to that part of the Gulf Pension Plan surplus attributable to the SAP.

(3) Can Surplus CRP and SAP Assets be Distributed Under § 10.A.2 Upon a Partial Termination?

Defendants argue that even if plaintiffs are entitled to surplus assets attributable *1197 to the CRP and SAP, that right can only vest, and such assets be distributed, upon a complete plan termination. Until then, defendants argue that these plans continue to accrue benefits, face future funding requirements and are subject to fluctuations in the investment market even if a partial termination has occurred. To resolve this argument the Court must determine whether either ERISA and the Code, or the CRP and SAP (as amended by the Gulf Plan), give plaintiffs a current right to surplus assets.

Complete plan terminations are governed by § 4041 of ERISA, 29 U.S.C. § 1341, which, prior to the Single-Employer Pension Plan Amendments Act of 1986, provided two methods of terminating an ERISA plan. First, a plan administrator could file a notice of termination with the PBGC and await its approval that plan assets were sufficient to discharge plan obligations. Upon receiving a sufficiency notice, the plan could be terminated. (The 1986 Act now requires 60 days' notice to participants, and no notice of sufficiency is issued.) Second, a plan administrator may terminate a plan by adopting an amendment that transforms the plan into an individual account

plan under ERISA. The distribution of assets upon a plan termination is governed by § 4044 of ERISA, 29 U.S.C. § 1344. Neither the language of this statute nor its legislative history indicates that Congress intended plan participants to receive surplus plan assets prior to a complete plan termination. Van Orman v. American Ins. Co., 680 F.2d 301, 313 (3d Cir.1982). Nor does the Code create an entitlement to a distribution of plan assets before a complete plan termination. Code § 411(d)(3) only requires that upon a partial termination accrued employee benefits be vested and employee accounts be nonforfeitable. "[T]he purposes and policies of partial terminations under the tax code do not apply in the context of vested employees attempting to gain plan surplus." Chait, 835 F.2d at 1021.

Although neither ERISA nor the Code creates a right to a distribution of surplus assets before a complete plan termination, such a right can exist under the law of contract if provided by a plan. Plaintiffs argue that § 10.A.2 of the Gulf Plan provides such a right. The Court is not persuaded by this argument. Section 10.A.2 is an amalgamation of the language found in or required by Code § 411(d)(3) and § 4044(a) of ERISA, 29 U.S.C. § 1344(a). The first paragraph of § 10.A.2 is very similar to Code § 411(d)(3). This paragraph states: "Upon termination of the Plan the rights of members to the benefits accrued under the Plan to the date of such termination, to the extent then funded, shall be nonforfeitable." This language and the policies of the Code requiring it do not entitle a plan participant to surplus plan assets. See Chait, 835 F.2d at 1021.

The next to last paragraph of § 10.A.2, upon which plaintiffs' argument is primarily based, also appears intended to comply with Code § 411(d)(3) and not to grant Gulf Plan participants a right to surplus assets upon a partial termination. Although this paragraph states that § 10.A.2 is to apply to

partial as well as complete terminations, no other language in the Gulf Plan, or in any of the three predecessor plans, evidences that a plan participant is entitled to receive surplus assets upon a partial termination. The only provision in § 10.A.2 for distributing assets to Plan participants is the six-tier scheme mandated by § 4044(a) of ERISA.[53] Not only does this scheme not provide for the distribution of surplus assets to Plan participants, but the first, and especially the last, paragraphs of § 10.A.2 imply that any surplus is to be distributed to Gulf rather than to Plan participants. The next to last paragraph of § 10.A.2 was apparently included to make clear that if a partial termination occurred when the Plan did not have sufficient assets to vest Plan participants in all benefits accrued to that date, the six-tier allocation scheme would apply to determine how the available Plan assets would be allocated among Plan participants.[54]

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[53] Section 4044(a) is merely a mechanism for the orderly distribution of benefits already earned or accrued under the terms of a plan, and a distribution scheme enacted to comply with § 4044(a) does not confer upon plan participants a right to recover unaccrued benefits. Mead Corp. v. Tilley, 490 U.S. 714, 109 S. Ct. 2156, 2162, 104 L. Ed. 2d 796 (1989).

[54] Plaintiffs argue that a June 12, 1986, letter of William Bowman, who was a Gulf lawyer before joining PM&S in 1985, supports a finding that a partial plan termination would result in a distribution of surplus assets under § 10.A.2. The letter, which was written to suggest responses to class member claims, states in pertinent part:

> We . . . find that no termination or a partial termination of the Gulf Pension Plan occurred because of the [Cumberland Farms] sale. Consequently, no Plan participant is entitled to any distribution of Plan assets as you suggest in your letter. (Plaintiffs' Ex. 866 at p. 2)

The Court does not glean the inference urged by plaintiffs from this letter. To do so would be analogous to concluding that a court's denial of relief on the merits leads to an inference that a plaintiff would have been entitled to damages requested had the court not found against the plaintiff on the merits.

Although § 10.A.2 is as far from a paradigm of clarity, the Court concludes that it does not provide CRP or SAP participants a current right to surplus plan assets. This conclusion is consistent with the policies of ERISA and with the language of all of § 10.A.2 when read both in the context of the Gulf Plan as a whole and in juxtaposition to the three predecessor plans.

(4) Consequences of a Fair Reading of § 10.A.2

Plaintiffs are not entitled to a share of surplus Gulf Pension Plan assets attributable to the A&B Plan, and § 18.d of the Chevron Retirement Plan is therefore valid as to any Gulf Plan surplus attributable to the A&B Plan. Plaintiffs are entitled to surplus assets attributable to the CRP and SAP, and § 18.d is invalid to the extent that it contravenes that right. However, plaintiffs' rights to CRP and SAP surpluses do not vest, and such assets cannot be distributed, until a complete termination of these plans.[55]

c. Unanticipated Costs

The third criteria for determining whether defendants' denials of plaintiffs' surplus claims was an abuse of discretion considers whether the denials resulted in unanticipated costs to the plans. Defendants' denials of plaintiffs' claims to surplus assets did not impose increased costs on the three plans since the surplus remains in the plans' (now Chevron Retirement Plan) trust.

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[55] Since these are all questions of law, the Court would reach the same conclusions under a de novo standard of review.

3. Abuse of Discretion

Because the Court has found that defendants incorrectly denied CRP and SAP participants the right to surplus assets attributable to these plans, the Court must determine whether defendants' denials amounted to abuses of discretion. Three factors are important in this analysis: (1) the internal consistency of the plans under the defendants' interpretation, (2) any relevant regulations formulated by the appropriate administrative agencies (the IRS, the Department of Labor and the PBGC), and (3) the factual background of the determination and any inferences of lack of good faith. Batchelor v. International Brotherhood of Electrical Workers Local 861, 877 F.2d 441, 445-48 (5th Cir.1989). Although the fact that an administrator's interpretation is not the correct one does not in itself establish that the administrator abused his discretion, "[w]hen [his] interpretation of a plan is in direct conflict with express language in a plan, this action is a very strong indication of arbitrary and capricious behavior." Id. (quoting Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir.1982)).

a. Internal Consistency

Defendants' denials of plaintiffs' surplus claims were inconsistent with the express language of CRP and SAP, which entitled CRP and SAP participants to an allocable share of surplus assets upon plan termination. Although § 18.d of the Chevron Retirement Plan states that surplus assets will revert to Chevron, and § 10.A.2 of the Gulf Plan impliedly reserves Gulf's right to take such a reversion, the CRP and SAP prohibited reversions and reversionary amendments and allocated any plan surpluses to plan participants. Under the terms of the CRP and SAP and their accompanying trust agreements, all contributions to these plans belong to plan members, and Chevron's attempt to create a right of reversion

is inconsistent with the language of the CRP and SAP and their trusts, especially when, as here, that attempt occurred after all contributions to these plans were made.

b. Relevant Regulations

Because defendants' denials of plaintiffs' surplus claims precluded CRP and SAP plan participants from obtaining surplus assets of those plans, the Court finds that these denials were contrary to § 4044(d) of ERISA, 29 U.S.C. § 1344(d) and PBGC regulation implementing this statute. Section 4044(d)(1) allows an employer to recapture surplus assets upon a complete plan termination if three conditions are met. The third condition is that the plan provide for such a distribution. § 4044(d)(1)(C) of ERISA, 29 U.S.C. § 1344(d)(1)(C). PBGC Regulation § 2618.30 restates this section of ERISA. Not only did the CRP and SAP not provide for employer reversions of surplus assets, their trust agreements expressly prohibited reversions, and the plans allocated surplus assets to their participants. Accordingly, because defendants' denials of plaintiffs' surplus claims necessarily included a determination that surplus CRP and SAP assets belonged to Gulf and Chevron, they contravened § 4044(d)(1)(C) of ERISA and PBGC Regulation § 2618.30.

c. Factual Background and Inference of Lack of Good Faith

A pension plan administrator is entitled to less discretion if he labors under a conflict of interest. As the Fifth Circuit explained in Lowry v. Bankers Life & Casualty Retirement Plan, 871 F.2d 522, cert. denied, --- U.S. ----, 110 S.Ct. 152, 107 L.Ed.2d 111 (1989): We note that 'the arbitrary and capricious standard may be a range, not a point. There may be in effect a sliding scale of judicial review of trustees'

decisions . . . --more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is . . . .

Id. at 525 n. 6. Consistent with this analysis the Eleventh Circuit has stated that "a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries." Brown v. Blue Cross & Blue Shield, 898 F.2d 1556, 1566-67 (11th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 712, 112 L.Ed.2d 701 (1991).

There was substantial evidence that Chevron considered how to revert the surplus Gulf Plan assets claimed by plaintiffs for its general corporate uses. In a confidential May 2, 1984, memorandum to Chevron Deputy Comptroller R.G. Williamson entitled "Cash Surplus Utilization SOCAL/Gulf Pension Plan," Comptroller G.K. Carter wrote that:

> We have quickly reviewed available information on the Socal and Gulf pension plans to determine how much surplus funding may exist that could possibly be utilized for general Corporate purposes. These are general numbers to be considered only as rough indications of a potential cash source. The message, however, is clear. substantial overfunding exists in terms of today's interest rates, especially in the Gulf plan . . .
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> . . .
>
> The ultimate termination/merger of the Gulf plan into the Socal plan may provide an opportunity to utilize a significant portion of

> the existing surplus. As there is no lump sum provision, the overfunding for actives may be available as well as that of the retirees. We will investigate legal options that exist to extract overfunding, and will promptly advise the Benefits Staff that any commitments made in connection with the Gulf pension plan (like giving them a lump sum option) could have significant cash and financial effects and should be referred to the Corporation Comptroller for review . . . . (Plaintiffs' Ex. 50)

Six days later Carter wrote Chevron Vice President J.N. Sullivan that: "[i]t is important that the company capture this overfunding either in the form of a higher purchase price to the buyer [of divested Gulf operations] or retention of the excess funding by the Gulf Plan (which ultimately can be used by Chevron)." (Plaintiffs' Ex. 51) Chevron's intent to revert the Gulf Plan surplus is also evidenced in an internal memorandum concerning negotiating strategies for the sale of Gulf operations. In a July 6, 1984, memorandum to Charles Mackdanz, manager of Chevron's benefits staff, Williamson wrote that "[t]he most important overall objectives are that . . . no precedents be set that might be onerous for the divestiture negotiations or ultimate merger of Gulf and Socal plans in a fashion that allows excess asset reversion." (Plaintiffs' Ex. 86)

Chevron's planning to revert surplus Gulf Plan assets occurred despite concerns expressed by PM&S to Chevron that "the reversionary authority in the present Gulf Plan is weak and a serious legal question exists as to whether it can be amended to provide the desired language." (May 18, 1984, memo re "Gulf Asset Disposal" to Mackdanz from T.M. McNamara, managing partner of PM&S; Plaintiffs' Ex. 67 at p. 3) Subsequent legal analysis by PM&S did not quell this concern.

Frank Roberts, a PM&S partner and former General Counsel of Chevron, advised Chevron in April 1985 that no reversions of Gulf Pension assets could be accomplished without adding an explicit reversion provision. After citing the statutory requirements of § 4044(d) of ERISA, Roberts wrote:

> . . . The Gulf Pension Plan does not contain a specific reversion provision, although there are several sentences in the Gulf plan which imply that a reversion is contemplated. However, because of the specific statutory requirements set forth in § 4044(d)(1)(C) and because so much is at stake, I think it is essential to amend the Gulf Pension Plan to incorporate a specific reversion clause if the termination/reversion procedure is to be implemented. (Plaintiffs' Ex. 68 at p. 4)

In spite of the concerns raised by PM&S attorneys about the ability to take a reversion, Chevron continued to plan how best to benefit from the surplus assets of the Gulf Plan. The primary consideration whether to take a reversion was not the Gulf Plan language but rather whether a reversion would be profitable under tax laws. In a confidential May 1, 1985, memorandum to Sellers Stough, Chevron's Vice-President of Finance, Carter wrote that the Gulf Plan needed to be amended before the tax considerations could be resolved, but cautioned that the amendments should be done in a manner that would not be detected by Gulf Plan members.

> Unfortunately, certain initial steps which disclose a possible plan termination must be taken before we will accurately know if our 1985 tax position warrants a reversion. Specifically, the Gulf Pension Plan would have to be amended to clarify that, upon

> termination, surplus assets from the Plan will be returned to the Company. Such an amendment should be included with a series of less sensitive "change of control" amendments now planned for June 1 adoption . . . . Due to the sensitivity of this subject and the need for definitive action in advance of knowing whether such a reversion is warranted by a sizable domestic tax loss for 1985, we must now seek senior management guidance on whether we should proceed with these initial steps. (Plaintiffs' Ex. 102 at p. 2)

The ultimate decision not to seek a reversion of Gulf (or Chevron) pension plan assets before the merger of the plans on July 1, 1986, was not based on the uncertainties expressed by PM&S lawyers regarding the Gulf Plan language, but on a cost, benefit analysis weighing potential tax savings against the negative employee relations and publicity surrounding a reversion of pension plan assets. (May 2, 1986, memo from Carter to Stough, Plaintiffs' Ex. 54)

Although this abbreviated summary of the evidence of Chevron's lack of good faith would ordinarily require the Court to use a "more penetrating" analysis in assessing defendants' denials of plaintiffs' surplus claims, the good faith issue is not so simple. There was no evidence that any of the plaintiffs' surplus claims were directed to the CRP or SAP surplus. Both plaintiffs' claims and Chevron's internal analysis focused exclusively on the language of the Gulf Plan, and in particular § 10.A.2.[56] Chevron's denials of the claims were generally

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[56] The broadest claim found by the Court was a challenge to Chevron's reversionary amendment contained in a December 18, 1986, appeal to the Chevron Retirement Plan Review Panel by class member

predicated upon the absence of a partial termination, rather than the remedy available to claimants had such a termination occurred. Although for the reasons discussed above the Court finds that plaintiffs' claims necessarily subsumed within them the plaintiffs' entitlement to surplus assets under the three constituent plans, that does not mean that Chevron's denial of these claims, even in this situation of an obvious conflict, is evidence of a lack of good faith with respect to its implicit determination that CRP and SAP participants were not entitled to an allocable share of surplus assets upon a complete termination of those plans. The Court concludes that the evidence on the good faith component of the abuse of discretion standard is in equipoise.

d. Conclusion

Defendants' implicit denials of plaintiffs' claims to surplus CRP and SAP assets upon a complete termination of these plans were contrary to a fair reading of the CRP and SAP. Since these denials were also inconsistent with the language of the CRP and SAP and were contrary to § 4044(d)(1)(C) of ERISA and PBGC Regulation § 2618.30, the Court finds that these denials, albethey implicit, were abuses of defendants'

William Gill. (Plaintiffs' Ex. 1032 at pp. JK 000977) In paragraph two of his letter Gill complained that "[u]nder the provisions of the Gulf Pension Plan, no change can be made in the plan that would allow the assets of the Plan to be used for anything but the exclusive benefit of the members or their beneficiaries. Therefore, Chevron does not have the right to use any over-funded portion of the Gulf Pension Plan for other corporate purposes." Although the Court could not locate the Review Panel's reply to Gill in the trial exhibits, Plaintiffs' Ex. 26 is a January 28, 1987, memorandum from PM&S suggesting a reply by the Review Panel to Gill and other claimants. The suggested reply said only that "[n]one of the assets held under the Chevron Retirement Plan, including Supplement A thereto (which constitutes a restatement of the Gulf Pension Plan) have been used, can be used, or will be used other than for the exclusive benefit of participants, future participants, former participants and beneficiaries."

discretion. However, also implicit in defendants' denials of plaintiffs' surplus claims was defendants' determination that any rights of plaintiffs to CRP or SAP surplus assets did not vest, and such assets could not be distributed, until a complete termination of those plans. Because that determination is consistent with a fair reading of the CRP and SAP, as amended by the Gulf Plan, and with ERISA, defendants' refusal to pay surplus assets to CRP and SAP participants was not an abuse of discretion.

IV. TERMINATION OF THE CRP AND SAP AS WASTING TRUSTS

Plaintiffs allege that when the Gulf Pension Plan and Chevron Annuity Plan were merged into the Chevron Retirement Plan on July 1, 1986, the CRP and SAP trusts were "dry" or "wasting" trusts whose material purposes had been accomplished. Therefore, regardless of the Court's ruling on their claims to the Gulf Plan surplus, plaintiffs allege that under the common law of trusts the CRP and SAP trusts should be terminated as of June 30, 1986, and all surplus assets distributed to CRP and SAP participants. Plaintiffs argue that this remedy would provide two additional benefits. First, it would give full effect to the CRP and SAP language that assets can never revert to Gulf, and upon plan termination any remaining assets are to be distributed to plan participants. Second, it would prevent any future misuse of CRP and SAP surplus assets to fund benefits of Chevron employees who were not participants in the CRP or SAP.[57]

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[57] Plaintiffs also argue that the CRP and SAP should be terminated to cure defendants' ongoing fiduciary breaches of using CRP and SAP assets to fund benefits for other Chevron employees. However, as the Court discusses in part V.C. & D., infra, plaintiffs have not proved that CRP and SAP assets have been used for such purposes.

Defendants reply that because ERISA preempts common law the Court must look only to ERISA and the Code to determine whether the CRP and SAP trusts are wasting. Defendants argue that under the Code a wasting trust can only occur if the accompanying plan is "frozen" or "terminating." The IRS defines a "frozen plan" as one in which all future accruals have ceased but the trust continues in operation. Plan Termination Handbook § 3(10)0(1). A "terminating plan" results when an amendment has been adopted to terminate the plan but trust assets have not yet been distributed. Revenue Ruling 89-87, 1989-2 C.B. 81. Defendants argue that the CRP and SAP are neither frozen nor terminating plans, and their trusts are therefore not wasting, because benefits continue to accrue to CRP and SAP participants for Chevron employment and because the CRP and SAP do not exist as separate plans, but were merged into the Gulf Plan in 1975 and then into the Chevron Retirement Plan in 1986. The Court finds plaintiffs' arguments more persuasive.

Courts may apply federal common law to employee benefit plans to supplement ERISA. Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1297 (5th Cir.1989). However, a federal court does not have unlimited power to apply any legal doctrine it chooses in ERISA actions. ERISA is a " 'comprehensive and reticulated statute' which Congress adopted after careful study of private retirement pension plans." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510, 101 S.Ct. 1895, 1899, 68 L.Ed.2d 402 (1981). It establishes standards governing the "conduct, responsibility, and obligation for fiduciaries of employee benefit plans . . . and [provides] for appropriate remedies, sanctions, and ready access to the Federal courts." § 2(b) of ERISA, 29 U.S.C. § 1001(b). ERISA also contains a broad preemption clause, § 514(a) of ERISA, 29 U.S.C. § 1144(a), and generally supersedes state law as it relates to pension plans. In this statutory environment, a court may apply federal common law to an ERISA plan only if

ERISA does not expressly address the issue and the common law rule is consistent with the underlying purposes of ERISA. Cefalu, 871 F.2d at 1297. See generally United States v. Little Lake Misere Land Co., 412 U.S. 580, 593, 93 S.Ct. 2389, 2397, 37 L.Ed.2d 187 (1973).

Both of these requirements are met in this case. ERISA's plan termination provisions do not address the issue of trusts that are wasting because their objectives have been satisfied. See § 4041 of ERISA, 29 U.S.C. § 1341. While the trusts associated with a "frozen" or "terminating" plan have been described as wasting trusts, neither the Code nor IRS rules address a trust that is wasting because its material purposes have been achieved. See Revenue Ruling 89-87, 1989-2 C.B. 81.

Resort to the common law of trusts is also consistent with the underlying purpose of ERISA, which is rooted in the common law of trusts and incorporates the core principles of several areas of trust law. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 954-55, 103 L.Ed.2d 80 (1989). "Congress . . . intended that the courts 'draw on principles of traditional trust law' in formulating remedies for violations of ERISA's fiduciary standards." Nieto v. Eker, 845 F.2d 868, 872 (9th Cir.1988). In formulating equitable remedies under §§ 409(a) and 502(a)(3) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a)(3), courts have therefore looked to the law of trusts. E.g., Eaves v. Penn, 587 F.2d 453, 462 (10th Cir.1978).

At common law if a trust did not state a definite term, it was deemed to last until its purpose was accomplished. Once the object of the settlor had been achieved, the trust was deemed to end since its continuation would be useless and might frustrate the intent of the settlor to a beneficiary or remainder interest. See Brine v. Paine Webber, Jackson & Curtis, Inc.,

745 F.2d 100, 104 (1st Cir.1984); G.G. Bogert & G.T. Bogert, TRUSTS & TRUSTEES § 1002 (2d ed. 1983). The purposes of the CRP were "to encourage employees to save a portion of their current compensation and to assist them in providing an additional income upon retirement, over and above the amounts payable under the Gulf Annuities and Benefits Plan and social security laws." (ESP, Plaintiffs' Ex. 428 at p. 3) The SAP expressed a similar purpose of "encouraging employees to save a portion of their current compensation to provide additional income upon retirement." (SAP, Plaintiffs' Ex. 409 at p. 1)

These objectives have been accomplished and there is no material purpose or further benefit to the CRP and SAP or their participants in continuing these trusts. Since membership in the CRP and SAP has been closed since December 31, 1970, and no employee contributions have been made since then, these plans and their trusts no longer serve the purpose of encouraging employee savings through contributions. Employed participants no longer earn significant additional benefits from service, and the trusts have more than enough assets to provide all future benefits due active and retired plan members and their beneficiaries.

Extrapolating from Plaintiffs' Ex. 1275, a January 1, 1985, report prepared by Gulf's actuary, plaintiffs' expert Dreher testified that there were 2,900 active and 16,000 retired and other inactive members of the CRP and SAP as of June 30, 1986. The average active member was in his 50's and would retire in 15 years or sooner, and the youngest plan member had a life expectancy of 32 years. The average age of the 16,000 inactive CRP and SAP participants was 68. Retired and other inactive plan participants accounted for approximately 94% of the liabilities of the CRP and SAP. (E.g., Plaintiffs' Ex. 1325) On June 30, 1986, the CRP trust had assets of $279.3 million and a surplus after accounting for all present and future liabilities of $122 million. (Plaintiffs' Ex. 1325) The SAP trust

had assets in excess of $4 million and a surplus in excess of $2 million. (Plaintiffs' Ex. 1255 at p. 9) Because most active CRP and SAP participants were close to retirement, their projected benefits from future service had a present value of only $4 million, which was de minimis in relation to the surplus assets in the plans. Id.[58]

Defendants admit that since June 30, 1986, these assets and surpluses have increased as benefit payments have declined. (See Defendants' Ex. 285.) Current earnings on the trust assets alone are more than sufficient to pay all benefits and still add money to the surpluses. According to Dreher, if the CRP and SAP are not terminated, when the last pensioner or widow or widower dies these plans will have assets of $1.3 billion with no liabilities assuming an 8%, below normal, annual growth rate.

Because the goals of the CRP and SAP have been accomplished, continuance of the CRP and SAP trusts would unnecessarily frustrate the intent of the settlors as to the disposition of surplus trust assets. The CRP and SAP state that Gulf intended all surplus assets to be allocated to plan participants, not the employer.[59] Because membership in the

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[58] Based on Chevron's historical practice of paying AVIS cost of living increases, Dreher testified that the cost of such increases would also be de minimis. Since June 30, 1986, the need to fund AVIS benefits for CRP and SAP participants has increased the liability of the plan trusts by only $7 million, or 1.9% of trust assets. (Plaintiffs' Ex. 1326) The evidence at trial reflected that although these payments are voluntary, Chevron has a history of declaring AVIS benefits averaging slightly less than 2% per year. Assuming an annual growth of CRP and SAP assets at 10.5% per year (which Chevron witness Darling testified was a reasonable return on plan assets) even if Chevron more than doubled AVIS payments to 4.5% per year, CRP and SAP assets would grow to $2.4 billion by the time the last plan beneficiary died. (Plaintiffs' Ex. 1327)

[59] See part III.B.2.b.(2)(c)(ii) and (iii), supra.

CRP and SAP has been closed for 20 years, the plans are substantially overfunded with respect to all future demands, and the trust assets cannot revert to Chevron, to forestall termination of the CRP and SAP would create the opportunity for Chevron to achieve by employee *1204 attrition what it is prohibited from obtaining under the plans' language. Such a result would be inconsistent with the goals and objectives of ERISA. Furthermore, since CRP and SAP members also contributed to these plans, they too are settlors under common law, and their intent would also be frustrated were these trusts not terminated. These plan members and beneficiaries, most of whom are retired, are getting older with each passing day, and prolonging the plans means that ever fewer participants will have the opportunity to enjoy the benefits of the plan surpluses.

Relying principally on Walsh v. Great Atlantic & Pacific Tea Co., 96 F.R.D. 632 (D.N.J.), aff'd, 726 F.2d 956 (3d Cir.1983), and Van Orman v. American Ins. Co., 680 F.2d 301 (3d Cir.1982), defendants argue that the existence of a plan surplus does not require termination of the plan or its trust under ERISA. Although this is a correct statement of the law, defendants' reliance on these cases is misplaced. In Walsh the court found that neither ERISA nor the plan language required termination of an overfunded plan. Not only did the court not address the wasting trust argument advanced in the case, but the court's discussion of the facts makes Walsh easily distinguishable on its facts. The Walsh court found that:

> It is undisputed that, prior to this lawsuit, the plan fund was 'overfunded' in the sense that, if termination were to have occurred, excess assets would have remained after satisfying liabilities created by the 'Benefits' section of the plan. Yet, A & P employed such excess assets in a variety of ways, such as by eliminating or reducing its contributions to the fund or by extending

> benefits or coverage. This was done without protest from any of the participants; none claimed the right to any part of such 'excess.'

96 F.R.D. at 650. Unlike the plan in Walsh, CRP and SAP membership has long been closed and the plans are substantially overfunded as to all future liabilities. The CRP and SAP are not accruing significant benefit obligations that could potentially eliminate their surpluses. Nor could the surpluses be used to eliminate or reduce future employer contributions since none have been made since 1970. Therefore, unlike the facts of Walsh, delaying termination of the CRP and SAP trusts would benefit neither the plans nor their participants in the future.

Van Orman merely holds that members of a defined benefit pension plan have no general right under ERISA or common law to a surplus upon a plan termination. This is a correct statement of the law, but like Walsh it does not address the present inquiry, which is whether under the facts of this case, the CRP and SAP trusts should be terminated and the surpluses distributed to plan participants under trust law.

Defendants also argue that the CRP and SAP cannot be wasting trusts because the 1975 Gulf Plan merger and the 1986 merger of the Gulf Pension Plan into the Chevron Retirement Plan did away with the CRP and SAP as separate plans. As discussed in part III.A. supra, the Court has found that the amendment, restatement and continuation of the three predecessor plans in 1975 did not result in their merger into a single ERISA plan. Furthermore, as discussed in part III.B.2.b.(2)(c)(ii) and (iii), the Court has found that § 18.d of the Chevron Retirement Plan is invalid as to that part of the Gulf Pension Plan surplus attributable to the CRP and SAP. For the reasons discussed above, the Court also finds that the CRP and SAP trusts were wasting trusts on June 30, 1986,

before the merger of the Gulf Plan into the Chevron Retirement Plan. Under these facts, the CRP and SAP should not have been merged into the Chevron Retirement Plan.

The Court finds that as of June 30, 1986, before the effective date of the Chevron plan merger, the CRP and SAP were wasting trusts that should have been terminated. Pursuant to the authority granted by § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), to order "appropriate equitable relief" to enforce the rights of members and beneficiaries of the CRP and SAP, and the authority granted by § 409(a) of ERISA, 29 U.S.C. § 1109(a), to reform the Chevron Retirement Plan to bar Chevron from achieving a reversion of CRP and SAP assets, see Delgrosso v. Spang & Co., 769 F.2d 928, 937-38 (3d Cir.1985), the Court will require the CRP and SAP, and their assets and liabilities, to be spun-off from the Chevron Retirement Plan, as of June 30, 1986, according to the terms of the Final Judgment entered with this Opinion.

V. FIDUCIARY CLAIMS

A. Pension Plan Expenses

Plaintiffs allege that Gulf and Chevron improperly caused the Gulf Pension Plan to pay expenses of outside investment managers that should have been paid by Gulf and Chevron under the Plan. Section 7.D.2 and .3 of the Plan (Plaintiffs' Ex. 29) provided that the Pension Fund Investment Committee had the sole responsibility for the appointment of investment managers and other outside consultants to assist in supervising and managing plan assets. Section 7.A.4 of the Gulf Pension Plan states:

> **Committees' expenses.** Members of the Committees shall be reimbursed by the Company for any expenses incurred by the

> members of the Committees, individually or collectively, in the performance of their duties hereunder. All expenses incident to the services of persons retained by the members of the Committees, individually or collectively, shall be paid by the Company. (Plaintiffs' Ex. 29 at p. 25) (emphasis added)

Before 1982 Gulf paid outside investment management fees and expenses. From 1982 through the end of June 1986 Gulf and Chevron caused the Gulf Pension Plan to pay investment management fees and expenses in the following amounts:

1982	$ 2,078,000
1983	$ 2,759,000
1984	$ 3,844,000
1985	$ 3,766,000
1985 (first six months	$ 2,778,000
Total	$15,225,000

(Plaintiffs' Ex. 1228)[60]

Relying on Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), defendants argue that Gulf, Chevron, and the Gulf Pension Plan Benefits Committee are fiduciaries, that their decisions to pay these expenses from Plan assets should be reviewed under an abuse of discretion rather than a de novo standard, and that under this standard their payment decisions were not abuses of discretion. Defendants contend that Firestone is satisfied by § 7.C-4(a) of the Plan, which gave the Gulf Benefits Committee authority to "construe and interpret the Plan and, subject to the provisions of the Plan, decide all questions of eligibility and determine the amount, time and manner of payment of any benefits."

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[60] The years shown are those in which the expenses were incurred. Actual payments normally occurred the following year.

In Firestone the Court went out of its way to emphasize that its holding and analysis was very limited. The Court stated:

> The discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) [s 502(a)(1)(B) of ERISA] actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

109 S.Ct. at 953. Although the Court permitted an exception to de novo review when an ERISA plan expressly delegated to the plan fiduciary the authority to determine benefits and interpret the plan, the Court emphasized that "wholesale importation of the arbitrary and capricious standard into ERISA is unwarranted." Id. (emphasis in original)

Plaintiffs' claim is not premised upon an erroneous denial of benefits under § 502(a)(1)(B) of ERISA, but is grounded instead upon breaches of fiduciary obligations and Plan provisions actionable under §§ 406(a)(1)(D) and 502(a)(3) of ERISA, 29 U.S.C. §§ 1106(a)(1)(D) and 1132(a)(3). Section 406(a)(1)(D) of ERISA states:

> Except as provided in section 1108 of this title:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--
>
> . . .

> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan;

Employers such as Gulf and Chevron are parties-in-interest with respect to a plan covering their employees. § 3(14)(C) of ERISA, 29 U.S.C. § 1002(14)(C). Section 502(a)(3) of ERISA states: A civil action may be brought--

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

When a plaintiff sues to enforce an express statutory fiduciary duty under § 406(a)(1)(D) and to challenge acts of the employer, as a fiduciary, that advance the employer's own economic interest, the abuse of discretion standard does not apply. See Struble v. New Jersey Brewery Employees' Welfare Trust Fund, 732 F.2d 325, 333 (3d Cir.1984). Instead, the Court will apply the strict standards imposed by ERISA, which mandate that fiduciaries act "solely in the interests of the participants and beneficiaries" [the duty of loyalty] and with the "care, skill, prudence, and diligence . . . that a prudent man acting in a like capacity . . . would use . . . " [the duty of care]. § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1).

Moreover, even if the Firestone analysis were applicable to this claim, the Court finds that defendants have failed to satisfy the express language test with respect to the payments at issue. Under this test discretion cannot be implied from an instrument's language.

> [T]he circuit courts which have found that particular ERISA plans granted discretion to plan administrators or fiduciaries, in cases decided after Firestone, have uniformly rested this finding upon express language of the ERISA plan before them. (emphasis in original)

Cathey v. Dow Chemical Co. Medical Care Program, 907 F.2d 554, 559 (5th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 964, 112 L.Ed.2d 1051 (1991), citing Moon v. American Home Assurance Co., 888 F.2d 86, 88 (11th Cir.1989). Although § 7.C.4(a) of the Gulf Plan gave the Benefits Committee the power to construe and interpret the Plan, the last sentence of § 7.C.4 stated:

> The Benefits Committee shall have no power to add to, subtract from, or modify the terms of the Plan or change or add to any benefits provided by the Plan, or to waive or fail to apply any requirements of eligibility for benefits under the Plan.

Since § 7.A.4 of the Plan required that the expenses in issue "shall be paid by the Company," any discretion afforded the Benefits Committee by § 7.C.4 could not "subtract from, or modify [this expressed term] of the Plan."[61]

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61 Relying principally on the June 23, 1983, minutes of the Investment Committee (Defendants' Ex. 336), plaintiffs argue that the Investment Committee, which had no discretion to construe or interpret the Plan, actually made the decision to pay these expenses from Plan assets. Although these minutes do recite the decision by the Investment Committee to pay such expenses out of Plan assets, they also direct the Committee's secretary "to advise the Benefits Committee of this decision and to request that it authorize the Trustee to make these payments out of the funds." Id. Given the lack of evidence on who ultimately made this decision, the Court finds that plaintiffs

Applying the duty of loyalty and duty of care standards, the Court finds that defendants' payment of investment fees and expenses from Plan assets was contrary to the plain language of § 7.A.4 of the Plan and violated §§ 406(a)(1)(D) and 502(a)(3) of ERISA. Defendants' use of plan assets to satisfy an obligation expressly imposed by the Plan on Gulf resulted both in a use of Plan assets for the benefit of a party-in-interest prohibited by § 406(a)(1)(D) of ERISA and a violation of § 7.A.4 of the Plan that entitles plaintiffs to relief under § 502(a)(3)(A) of ERISA. Gulf need not have drafted the Plan to require it to pay these expenses, but having done so, it had to comply with that obligation.

Even were the Court to apply an abuse of discretion standard, the Court would reach the same result. Jordan v. Cameron Iron Works, Inc., 900 F.2d 53 (5th Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 344, 112 L.Ed.2d 308 (1990), teaches that the threshold determination in an abuse of discretion review is whether the plan fiduciary has "given a plan the legally correct interpretation." Id. at 56. If not, then a three-factor analysis is applied to determine whether the fiduciary's error rises to an abuse of discretion. Id.

To explain their departure from Gulf's long-standing policy of paying these expenses directly, defendants point to an April 29, 1983, letter from Gulf attorney William Bowman to R.A. McKean III, secretary of the Gulf Pension Fund Investment Committee. (Defendants' Ex. 338) After quoting § 7.A.4 of the Plan, Bowman stated that "this section does not support the position that these kinds of services must be paid for by the Company." Bowman then stated that the real question was one of policy--whether Gulf wanted all Plan expenses to be paid out of Plan assets. He concluded that there would be no net benefit to Gulf if such expenses were paid out of Plan assets since

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have failed in their burden of proof on this argument.

ultimately Gulf would have to make larger contributions to the Plan to compensate for such expense payments from Plan assets. The Court finds that Bowman's interpretation and defendants' reliance on it is not legally correct. Applying the Jordan three-factor analysis, the Court also finds that defendants' determinations to pay these expenses from Plan assets rather than corporate funds were (1) inconsistent with prior practices and therefore were not part of any uniform construction of the Plan, (2) inconsistent with a fair reading of § 7.A.4 of the Plan, and (3) resulted in unanticipated costs to the Plan.

Defendants also seek to justify payment of these expenses from Plan assets by citing to §§ 9.1, 4.1, and 9.2 of the July 9, 1979, Gulf Agreement of Trust (Plaintiffs' Ex. 391). Section 9.1 provided for reimbursement of reasonable expenses incurred by the Master Trustee. Section 4.1 allowed the Master Trustee to pay trust expenses from the trust, as directed by the plan administrator. These two sections do not support defendants' argument because the expenses in issue were not incurred by the Master Trustee. The Investment Management Agreements pursuant to which these expenses were incurred were between the various investment managers and Gulf. (See Defendants' Exs. 342, 344 & 345.) In paragraph 16 of each of these agreements, Gulf agreed to pay the investment managers' fees.

Section 9.2 stated that "[a]ll compensation, expenses, taxes and assessments specified herein, to the extent that they are not paid by the Companies, shall constitute a charge upon the Trust and be paid by the Master Trustee from the Trust upon written notice from the Master Trustee to the Company." Defendants argue that this language is broad enough to permit payment of fees and expenses from the Trust and from the Gulf Pension Plan. The Court is not persuaded by this argument. Section 7.A.4 of the Gulf Pension Plan expressly required that such expenses be paid by Gulf, not the Plan. Nothing in the

Agreement of Trust contradicted this, and the quoted language from § 9.2 of the Agreement of Trust appears to have been included only to protect the trustee in the event that expenses incurred by the trustee were not paid by Gulf, a situation not before the Court.

Having concluded that defendants' decisions to pay expenses from Plan rather than corporate assets were not legally correct, the Court must next look to whether the decisions were abuses of discretion under the three factors articulated in Batchelor v. International Brotherhood of Electrical Workers Local 861 877 F.2d 441, 445 (5th Cir.1989). These payments were inconsistent with both § 7.A.4 of the Gulf Plan and Gulf's prior interpretation of it. Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D), requires that a plan fiduciary "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan . . ." Because these payments were inconsistent with § 7.A.4 they were also inconsistent with this statutory obligation. Finally, because of the conflict of interest affecting these decisions, the Court must gauge narrowly the good faith component of this analysis. Lowry v. Bankers Life & Casualty Retirement Plan, 871 F.2d 522, 525 n. 6 (5th Cir.), cert. denied, --- U.S. ----, 110 S.Ct. 152, 107 L.Ed.2d 111 (1989). Having considered these three factors, the Court finds that defendants abused their discretion in paying these expenses from Plan assets.

The Court will order that Chevron pay $15,225,000 to the Chevron Retirement Plan, to be held in trust for the use and benefit of class members who are beneficiaries of the Gulf Pension Plan. Because Gulf and Chevron, and not the Gulf Plan, have had the use and benefit of this money, the Court in the exercise of its equitable discretion will also order that

Chevron pay prejudgment interest on this amount at the rate of 10%, compounded annually.[62]

B. Self-Dealing by Chevron

The Asset Purchase Agreement between Chevron, as Seller, and Cumberland Farms, as Buyer, required Cumberland Farms to establish a pension plan for former Gulf employees who went to work for it. The Agreement also included a provision through which Chevron, prior to closing, fixed by means of actuarial assumptions, an amount of pension assets that Chevron would cause the Gulf Pension Plan to transfer to the Cumberland Farms' plan. (Cumberland Farms Asset Purchase Agreement, para. 3.2.e; Plaintiffs' Ex. 118 at p. 16) The Agreement provided that after the closing:

> . . . In the event that the trustees of the Seller's Pension Plan Trusts are required pursuant to applicable law to transfer to the trustee of the Buyer's Pension Plan Trust an amount in excess of the amount finally credited to the Buyer Subaccounts pursuant to section 3.2.e, Buyer shall reimburse Seller for the amount of such excess at the time it is so transferred. Seller shall use its best efforts in dealing with its actuaries and the appropriate regulatory authority to minimize the amount of such excess.

(Id. at para. 3.2.f; Plaintiffs' Ex. 118 at p. 18.)

Among the applicable law encompassed by paragraph 3.2.f was Code § 414(l), which required that a trust have sufficient

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62 The parties have agreed to this rate and period of compounding, and it is consistent with the rate of interest the Plan could have earned on this money had it remained in the Plan.

assets to fund the present value of accrued benefits under the plan calculated on an ongoing basis as a condition for qualification under § 401. If the Gulf Plan assets calculated under paragraph 3.2.e of the Asset Purchase Agreement were not sufficient to satisfy the requirements of § 414(l), Chevron, as Seller, agreed in paragraph 3.2.f to require the Gulf Pension Plan to transfer additional Plan assets to Cumberland Farms, and Cumberland Farms agreed to reimburse Chevron for such excess payments.

Chevron intentionally designed the actuarial assumptions upon which the initial transfer of Gulf Plan assets was to be calculated so there would not be a sufficient transfer of assets to satisfy Code § 414(1). Although Chevron knew that many Gulf employees would elect to take early retirement under Cumberland Farms' plan, especially undiscounted early retirement at age 62, the actuarial assumptions drafted by Chevron assumed that no former Gulf employees would retire early. The agreed actuarial assumptions to the Cumberland Farms Asset Purchase Agreement assumed that no Gulf employees would retire early, even though paragraph 3.2.d(3) and (4) of the same Agreement expressly required that Cumberland Farms' plan allow undiscounted early retirement at age 62 and discounted early retirement before age 62. (Plaintiffs' Ex. 118 at pp. 13-14 and Appendix 10, paragraph (5)) This anomaly was not an oversight. Chevron Assistant Comptroller R.G. Williamson instructed PM&S attorney William B. Berry, who drafted the Cumberland Farms Agreement, to include this provision in the actuarial assumptions of asset purchase agreements and also to include payback procedures in these agreements.[63] Both Williamson and Berry testified that they knew the early retirement

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[63] See August 3, 1984, and September 30, 1984, memoranda from Williamson to Berry; Plaintiffs' Ex. 93, at para. 3 and Plaintiffs' Ex. 95, at para. 3.

assumption was incorrect and would probably necessitate additional transfers from the Gulf Pension Plan to the buyer when the later § 414(l) calculations were required to be made.

The motivation for this negotiating posture was Chevron's desire to maximize its ultimate gain from divestitures by taking advantage of the overfunded status of the Gulf Pension Plan. As outlined in Plaintiffs' Ex. 51, a May 8, 1984, memo from Chevron Comptroller G.K. Carter to Chevron Vice- President J.N. Sullivan:

> A brief review of the Gulf pension plan shows it to be substantially overfunded. This has occurred for two primary reasons: (1) strong financial market performance the past two years, significantly increasing the market value of fund assets; (2) actuarial funding methods such as that used by Gulf traditionally overfund during earlier career years compared to pension benefits actually accrued. It is important that the company capture this overfunding either in the form of a higher purchase price to the buyer or retention of the excess funding by the Gulf plan (which ultimately can be used by Chevron).

After the Cumberland Farms divestiture, in return for requiring the Gulf Pension Plan to transfer assets to Cumberland Farms that would satisfy Code § 414(1), Chevron received an $8,272,566 promissory note from Cumberland Farms.[64]

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[64] The Asset Sales Agreement with Champion Energy would have resulted in the receipt by Chevron of a payback of approximately $972,699. That agreement was amended in February of 1988, however, to cancel the provision requiring a transfer of assets from the Gulf Pension Plan to

Section 406(b)(1) of ERISA, 29 U.S.C. § 1106(b)(1), prohibits a plan fiduciary from dealing with plan assets in its own interest or for its own account, and § 406(b)(3) of ERISA, 29 U.S.C. § 1106(b)(3), forbids a plan fiduciary from receiving any consideration for the fiduciary's own account from any party dealing with the plan in connection with a transaction involving plan assets. A transaction prohibited by § 406 is per se illegal regardless of whether the plan suffers an injury or the fiduciary profits from the transaction. Donovan v. Cunningham, 716 F.2d 1455, 1464-65 (5th Cir.1983), cert. denied, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984); Leib v. Commissioner, 88 T.C. 1474, 1480-81 (1987). In addition, § 409(a) of ERISA, 29 U.S.C. § 1109(a), requires a fiduciary who breaches a fiduciary obligation of ERISA to restore to the plan any losses resulting from the breach.

When Chevron negotiated and benefited from the Cumberland Farms Asset Purchase Agreement, it was a fiduciary of the Gulf Pension Plan, and the Agreement negotiated by Chevron was a transaction involving Gulf Plan assets. In negotiating the Agreement Chevron used its fiduciary status to obtain a quid pro quo for its own corporate benefit.

Chevron attempts to justify this payback procedure as "exclusively a business arrangement that did not implicate [its] fiduciary duties" (Defendants' Proposed Finding of Fact 3.58). The Court disagrees. The principal authority relied upon by Chevron, Sutton v. Weirton Steel Div. of National Steel Corp., 567 F. Supp. 1184, 1200-01 (N.D.W.Va.), aff'd, 724 F.2d 406 (4th Cir.1983), cert. denied, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), does not sanction the conduct of Chevron in this case. Sutton recognizes that there is nothing in ERISA that expressly prohibits an employer, which is naturally interested in reducing costs, from also acting as the

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Champion.

administrator or trustee of a pension plan. The language of the Sutton opinion upon which defendants rely states:

> However, it is the Court's opinion here that when a corporate employer negotiates the terms of sale of a division, whose employees are participants in a pension plan, the negotiations that affect the terms and conditions of future pension benefits (at least those that are not protected by ERISA's vesting and non-forfeitability provisions), do not implicate fiduciary duties as to the pension fund. Such negotiations are distinct from actually administering a plan and conducting transactions affecting the monies and property of the plan's fund.

567 F. Supp. at 1201. (emphasis added)

This case is easily distinguishable from Sutton and the other authorities cited by defendants because Chevron did more than merely negotiate a sale of assets to Cumberland Farms with resultant effects upon future pension benefits of transferring Gulf employees. Chevron's negotiations with Cumberland Farms also resulted in the payment of substantial funds from the Gulf Pension Plan to the Cumberland Farms' plan with a dollar-for-dollar payback, not to the Gulf Pension Plan, but to Chevron. The Court asked every Chevron witness who testified about this transaction why the Cumberland Farms Asset Purchase Agreement was not structured to provide for reimbursement to the Gulf Pension Plan, instead of Chevron, should additional asset transfers be required to satisfy Code § 414(l). The only answer the Court received was the tautological statement that it was a negotiated business transaction.

The fiduciary duty imposed by ERISA encompasses both a duty of loyalty and a duty of care. As this Court explained in Wright v. Nimmons, 641 F. Supp. 1391 (S.D.Tex.1986):

> The duty of loyalty . . . is commonly expressed in the form of a prohibitive rule. In short, a fiduciary must not treat the trust res as if it were his own property; the fiduciary must not abuse his position of trust in order to advance his own selfish interests. On the other hand, the duty of due care . . . is commonly expressed affirmatively. The fiduciary, therefore, must exercise at least that degree of care that a reasonably prudent person would devote to his own affairs under like circumstances. In short, a fiduciary must treat the trust res as if it were his own property; the fiduciary must exercise his position of trust so that the beneficiary of the trust is not harmed as a consequence of his failure to exercise reasonable care.

Id. at 1402. (emphasis in original) In scrutinizing this transaction under the fiduciary lens of ERISA, the Court must look at the intent, rather than the form, of what was done. See 1 J. Pomeroy, EQUITY JURISPRUDENCE § 378 (4th ed. 1918). Here, as in Wright, the Court concludes that Chevron, as a fiduciary of the Gulf Pension Plan, breached its duty of loyalty by treating the Gulf Pension Plan Trust as if it were Chevron's property. In doing so, Chevron violated § 406(b)(1) and (3) of ERISA. To remedy this fiduciary breach, the Court will order that Chevron pay $8,272,566 to the Chevron Retirement Plan, to be held in trust for the use and benefit of class members who are beneficiaries of the Gulf Pension Plan. Because Chevron, rather than the Plan, has had the use and benefit of this money, the Court in the exercise of its equitable

discretion will also order that Chevron pay prejudgment interest *1211 on this amount at the rate of 10%, compounded annually.[65]

The Court is not persuaded by plaintiffs' argument that a constructive trust should be established in favor of former Gulf Pension Plan members to be used exclusively to provide them with additional benefits beyond their benefits under the Gulf Plan. In the principal authority cited by plaintiffs to support such relief, Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1411-12 (9th Cir.1988), all of the plan participants and beneficiaries had been paid their actuarially vested benefits. Thousands of former Gulf Pension Plan participants, however, have not yet retired and thousands of those who have retired are still receiving Plan benefits. The Court's remedy will require Chevron to restore to the Chevron Retirement Plan the consideration that Chevron received from its fiduciary breach. Plaintiffs' concern that Chevron might some day receive this money back by terminating the Chevron Retirement Plan and receiving any plan surplus is conjectural at this point. Furthermore, the Court's remedy will have sufficient deterrent effect to satisfy the purposes of § 409(a) of ERISA. Chevron's reimbursement will not be a tax-deductible contribution under ERISA, but a reimbursement for funds improperly diverted from the Gulf Plan, and any future reversion of such funds by Chevron will be subject to the federal excise tax on employer reversions.

C. SRAP

In response to the decline in oil prices that began late in 1985, Chevron adopted the Special Retirement Allowance

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[65] The parties have agreed to this rate and period of compounding, and it is consistent with the rate of return that Chevron received on the Cumberland Farms payback.

Program ("SRAP") effective July 7, 1986. SRAP was a window program designed to encourage early retirement. Eligible employees received SRAP benefits in addition to their normal accrued pension benefits under the then merged Chevron Retirement Plan. SRAP benefits were available to all employees in eligible positions who met certain age and service requirements if they voluntarily retired between July 7, 1986, and November 30, 1986, and to all employees with one or more years of service who were involuntarily terminated for reasons other than cause during this period. Employees who received SRAP benefits were entitled to the greater of: (1) a recalculated benefit taking into consideration four additional years of age and four additional years of credited service, or (2) a minimum enhancement, in the form of a lump-sum benefit, of the employee's highest average earnings over a period of two-to-ten months, depending upon the employee's length of service with Gulf or Chevron. Employees who were not eligible for an early retirement benefit under the Chevron Plan after this additional crediting of age and service received an accrued benefit, including the enhancement, which was calculated using the Chevron Retirement Plan's early retirement factor (5% per year reductions from age 62). The entire benefit, including the enhancement, was available to employees in either a lump-sum or an annuity, regardless of the employee's age. Approximately 2,908 former Chevron employees and 929 former Gulf employees received SRAP benefits.

Plaintiffs allege that by paying a disproportionate amount of SRAP benefits to former Chevron employees who had never been members of the Gulf Pension Plan, Chevron breached its fiduciary duty to former Gulf Plan members and violated provisions of the Gulf Pension Plan and the Master Trust dealing with contributions to the CRP and SAP. Section 8.A of the Gulf Pension Plan stated:

> All contributions made by a member to [the CRP and/or SAP] shall continue to be held in trust under this Plan until such time as they are used for the exclusive benefit of the member or the member's joint pensioner or beneficiary. (Plaintiffs' Ex. 29 at p. 36)

Section 2.6 of the Master Trust in effect at the time of the July 1, 1986, plan merger stated:

> . . . [A]t no time prior to the satisfaction of all liabilities for benefits under any such Plan shall any part of the Trust be used for or diverted to purposes other than the exclusive benefit of participants, retired participants or beneficiaries under each Plan, and for the payment of expenses of each Plan. (Plaintiffs' Ex. 393)

Furthermore, as discussed in part III.A, supra, the CRP and SAP trust agreements and the 1979 Master Trust Agreement prohibited use of CRP or SAP assets for benefits and liabilities not provided by those plans.

As a factual matter, however, plaintiffs have failed to prove that SRAP benefits were paid from CRP or SAP assets. There was no evidence of which trust assets these benefits were paid from; SRAP benefits could just as likely have been paid from the surplus attributable to the A&B component of the Gulf Pension Plan trust or from the surplus attributable to the former Chevron Annuity Plan.[66] Furthermore, since the Court will

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[66] Likewise, there was no evidence that SRAP benefits were paid from the sub-set of CRP and SAP assets comprising member contributions that is addressed in Section 8.A of the Gulf Plan.

require that all CRP and SAP assets be segregated from the Chevron Retirement Plan as of June 30, 1986, and distributed to participants in the CRP and SAP, even had plaintiffs been able to trace any part of the SRAP benefits to the CRP or SAP component of the Chevron Retirement Plan trust, plaintiffs would still be unable to show any injury.

Nor does the Court conclude that Chevron breached any fiduciary duty by paying SRAP benefits from the assets of the merged Chevron Retirement Plan. Any economic benefit that Chevron derived from the manpower reductions that resulted from implementing SRAP did not violate ERISA's exclusive benefit rule, § 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1). This rule states that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." However, the rule does not prohibit implementation of SRAP merely because it provided an indirect benefit to Chevron.

The exclusive benefit rule prohibits an employer from using plan funds for the direct, primary benefit of the employer. The rule "cannot be read as a prohibition against any decisions of an employer with respect to a pension plan which have the obvious primary purpose and effect of benefiting the employees, and in addition the incidental side effect of being prudent from the employer's economic perspective." Holliday v. Xerox Corp., 732 F.2d 548, 551 (6th Cir.), cert. denied, 469 U.S. 917, 105 S.Ct. 294, 83 L.Ed.2d 229 (1984); see Bass v. Retirement Plan of Conoco, Inc., 676 F. Supp. 735, 748-49 (W.D.La.1988) (upholding validity of employer's implementation of an early retirement program after Conoco sold plaintiffs' division despite plaintiffs' claims that Conoco benefited from the work force reduction and that current Conoco employees received benefits that plaintiffs did not receive). Because the Court finds that the

benefits Chevron received from implementing SRAP were incidental to the primary purpose of providing early retirement benefits to Chevron employees, the Court concludes that SRAP was not a breach of Chevron's fiduciary duties to former Gulf Plan members.

D. AVIS

To partially offset the effects of inflation after the July 1, 1986, plan merger, Chevron paid Annuitant's Voluntary Income Supplements ("AVIS") to employees who had retired under the Gulf Pension Plan, the Chevron Annuity Plan, and Chevron Retirement Plan. Before the July 1, 1986, plan merger, Gulf had paid AVIS-type supplements from the Gulf Plan, but Chevron had paid AVIS supplements out of its corporate till. After the plan merger Chevron adopted the Gulf approach and paid all AVIS benefits from the newly merged plan. Plaintiffs level the same objections to the AVIS payments that they do to SRAP benefits.

The Court finds that plaintiffs have failed to prove that any AVIS payments were paid from CRP or SAP assets. Likewise, the Court concludes that plaintiffs have failed to show that Chevron violated the exclusive benefit rule by making AVIS payments from plan, rather than corporate, assets. See Van Orman v. American Insurance Co., 608 F. Supp. 13, 24 (D.N.J.1984) (employer's use of surplus assets attributable to employee contributions to reduce employer's own plan contributions instead of providing participants with increased benefits was a permissible exercise of the employer's business judgment and did not violate the employer's fiduciary obligations).

E. Defendants' Promises to Set Aside Gulf Plan Assets for Plaintiffs' Benefit

Plaintiffs allege that Chevron promised orally and through correspondence with plaintiffs (e.g., Plaintiffs' Exs. 1 and 620) and through company newspapers (Plaintiffs' Ex. 494) to set aside part of the Gulf Plan assets to provide reserves sufficient to secure benefits in the event that the Gulf Plan were ever merged with the Chevron Annuity Plan. Because no reserves were set aside, plaintiffs allege that Chevron breached its duty of loyalty under § 404(a) of ERISA, 29 U.S.C. § 1104(a) and common law. To cure these breaches, plaintiffs request the equitable remedy of specific performance.[67]

While no specific reserves were ever established, plaintiffs' expert, Mr. Dreher, testified that the merged Chevron Retirement Plan has a surplus in excess of accrued benefits of more than $800 million and that this surplus is likely to remain above the full funding limit for a considerable time. Furthermore, § 16(c) of the Chevron Retirement Plan (Defendants' Ex. 21) obligates Chevron to cause the participating companies to contribute to the plan each year an amount necessary to satisfy minimum funding standards for that year.

Although Chevron made the promises alleged by plaintiffs and did not establish a specific reserve for Gulf Plan members, the Court concludes that plaintiffs cannot prevail on this claim for several reasons. First, these promises were not contained

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[67] Originally this argument also focused on the diversion of Gulf Plan assets to pay SRAP and AVIS benefits. That portion of the argument has been addressed separately in parts V.C. and D. above. Furthermore, to the extent that plaintiffs' argument subsumes within it Chevron's use of CRP and SAP trust assets to satisfy other Chevron Retirement Plan obligations, that argument is addressed in parts V.C. and D., and any conceivable injury has been remedied by the relief provided in part IV and the Final Judgment.

in a written plan document as required by § 402(a)(1) of ERISA, 29 U.S.C. § 1102(a)(1). Plaintiffs admit that the writings that contained these representations were not plan documents. (Plaintiffs' Post-Argument Brief on Defendants' Promise to Set Aside Plan Assets for Plaintiffs' Benefit at p. 4) Since these claims do not arise out of an ERISA plan, they are not actionable under ERISA. Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1296-97 (5th Cir.1989); Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir.1989).

The mere fact that some of these representations were made in writing does not lead to a different result; the test is whether the claim is based on plan documents, not whether non-plan representations were oral or written. In Alday v. Container Corp. of America, 906 F.2d 660 (11th Cir.1990), cert. denied, --- U.S. ----, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991), the plan documents allowed the administrator to "terminate, suspend, withdraw, amend or modify the Plan in whole or part at any time." 906 F.2d at 662. Forms and correspondence sent to individual plan members stated that health insurance was available to members and their dependents upon retirement at a modest cost. When the employer later amended the plan to modify these benefits and substantially raise employee contributions for retiree health benefits, the plaintiff class alleged that the employer had breached its fiduciary duty under ERISA and was promissorily estopped from rescinding the representations contained in these non-plan written communications. In affirming the trial court's summary judgment for the defendants, the Eleventh Circuit held that, notwithstanding that the employer communications were in writing, they were not plan documents under § 402(a) of ERISA, and therefore the employer did not breach its fiduciary duty in disregarding such communications and relying instead on ERISA documents. Plaintiffs' promissory estoppel claim does not fare any better because it is well established that

ERISA preempts common law promissory estoppel claims. Degan, 869 F.2d at 895; Alday, 906 F.2d at 664-65.

Furthermore, even were plaintiffs' fiduciary and estoppel claims actionable, plaintiffs have not shown that they have suffered any injury that would create a ripe controversy in either the jurisdictional or prudential sense. Although a separate reserve for Gulf Plan benefits was not established, the Chevron Retirement Plan from which benefits are to be paid is substantially overfunded and will be for some time according to plaintiffs' own expert. Plaintiffs' benefits are further guaranteed by Chevron. The Court concludes that plaintiffs have therefore failed to show that the challenged action of defendants will have any direct and immediate impact on them that would warrant judicial consideration at this time. See Abbott Laboratories v. Gardner, 387 U.S. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967); Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164, 87 S.Ct. 1520, 1524-25, 18 L.Ed.2d 697 (1967). Similarly, with respect to their promissory estoppel claim, plaintiffs have not established either that they relied detrimentally on defendants' representations or if they did so, that they have suffered any cognizable harm.

F. Other Alleged Fiduciary Breaches

Plaintiffs allege that because Pillsbury, Madison & Sutro, the outside law firm that provided legal advice to the Gulf Plan fiduciaries after February of 1984, also had a long-standing and close relationship with Chevron, the Gulf Pension Plan Benefits Committee and Chevron should have retained separate law firms to represent their interests with respect to the plan merger. Plaintiffs have cited no authority for this

proposition,[68] and defendants have presented a case that refutes it. Ashenbaugh v. Crucible, Inc. 1975 Salaried Retirement Plan, 854 F.2d 1516 (3d Cir.1988), cert. denied, 490 U.S. 1105, 109 S.Ct. 3155, 104 L.Ed.2d 1019 (1989). In their Post-Trial Brief on Chevron's Fiduciary Breaches, plaintiffs appear to retreat from their initial argument on this alleged fiduciary breach and to argue instead that the Court should not give deference to the defendants' interpretations or actions because of the inherent conflict by the outside counsel who either carried out or advised plan fiduciaries concerning those interpretations and actions. As reflected by the preceding parts of this Opinion, the Court has evaluated the weight and credibility to be given to the actions and interpretations of defendants and their attorneys. To the extent that plaintiffs seek other, independent, relief because of the joint representation of Pillsbury, Madison & Sutro, their request for relief is denied.

The Court has considered other fiduciary breaches alleged by plaintiffs in various places in the Joint Pretrial Order, trial briefs, proposed findings of fact, and numerous post-trial briefs. To the extent they have not been expressly addressed in this Opinion, the Court finds that those allegations are not legally or factually supportable and denies any relief based upon them.

VI. CONCLUSION

1. The significant corporate event that occurred between January 1, 1984, and June 30, 1986, resulted in a vertical partial termination of the Gulf Pension Plan.

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[68] The closest authority cited by plaintiffs, Donovan v. Bierwirth, 680 F.2d 263, 273 (2d Cir.), cert. denied, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982), is fact determinative, and merely suggests that in some situations it may be a good idea for a plan to retain independent counsel. The Court does not quarrel with that advice, but declines to hold as a general proposition that independent counsel must be obtained in order to satisfy a fiduciary's duty of care or loyalty.

2. A horizontal partial termination of the Gulf Pension Plan occurred as a result of the reduction in future benefit accruals from the merger of the Gulf Pension Plan into the Chevron Retirement Plan on July 1, 1986, and all members of the class employed by Chevron on that date will be vested in all Gulf Pension Plan benefits accrued as of that date.

3. Defendants' denials of plaintiffs' claims to surplus CRP and SAP assets were an abuse of discretion. However, defendants' refusal to pay surplus CRP and SAP assets to plan participants prior to complete terminations of the plans was not an abuse of discretion.

4. Because the CRP and SAP trusts were wasting trusts on June 30, 1986, the day before the CRP and SAP were merged into the Chevron Retirement Plan, all CRP and SAP assets and liabilities will be spun-off from the Chevron Retirement Plan effective June 30, 1986, and segregated in separate trusts.

5. Defendants abused their discretion in paying the expenses of outside investment managers from the Gulf Pension Plan from January 1, 1982, through June 30, 1986, and have thereby caused damage to the Gulf Pension Plan of $15,225,000, plus prejudgment interest at the rate of 10% compounded annually.

6. Chevron, as a fiduciary under the Gulf Pension Plan, breached its fiduciary duty by requiring that the Cumberland Farms Asset Purchase Agreement contain a pay-back provision to Chevron, and has thereby caused damage to the Gulf Pension Plan of $8,272,566, plus pre-judgment interest at the rate of 10% compounded annually.

7. Chevron's payment of SRAP benefits did not breach its fiduciary duty or violate the provisions of the Gulf Pension Plan or the Master Trust.

8. Chevron's payment of AVIS benefits did not breach its fiduciary duty or violate the provisions of the Gulf Pension Plan or the Master Trust.

9. Defendants' failure to set aside a part of the Gulf Plan assets as reserves to secure benefits under the Gulf Pension Plan did not violate their duty of loyalty under ERISA or common law.

10. To the extent not expressly addressed in this Opinion, all other claims and relief sought by plaintiffs are denied. FINAL JUDGMENT In accordance with the Court's Opinion, the Court ORDERS, ADJUDGES and DECREES that:

1. All members of the class who were employed by Chevron Corporation on July 1, 1986, are vested in all Gulf Pension Plan benefits accrued as of that date.

2. Chevron Corporation shall pay to the Chevron Retirement Plan, to be held in trust for the use and benefit of class members who are beneficiaries of the Gulf Pension Plan, $23,497,566, together with pre-judgment interest at the rate of 10% compounded annually, and post-judgment interest at the rate of 6.26%.

3. The assets and liabilities of the Contributory Retirement Plan of Gulf Oil Corporation ("CRP") and the Supplemental Annuity Plan of Mene Grande Oil Company ("SAP") shall be spun off from the other assets and liabilities of the Chevron Retirement Plan as

soon as practicable following the date of this Judgment, and segregated in separate trusts according to the following terms:

(a) The assets of the CRP and SAP to be spun off shall include all assets in the trusts (or sub trusts) for the plans as of June 30, 1986, adjusted for all actual trust fund earnings and distributions to participants and beneficiaries of the plans since then;

(b) The amount of assets and liabilities spun off shall be subject to the final approval of Chevron's independent enrolled actuary and Mr. William A. Dreher, who is appointed to serve as enrolled actuary for the spun-off plans. Any disputes between the actuaries will be resolved by the Court. The spun-off assets shall be segregated, liquidated as necessary and prudent, and invested in temporary investments under the supervision of class counsel pending the appointment of a trustee and pending termination of the CRP and SAP and distribution of their assets;

(c) Chevron Corporation will take all necessary ministerial steps to accomplish the spin-offs including (1) the filing of the appropriate advance notification with the Internal Revenue Service as soon as reasonably practicable, and (2) the execution of appropriate amendments to the Chevron Retirement Plan, which shall be submitted in advance to plaintiffs' counsel for comments and to the Court for advance approval. The amendments shall reflect the separateness of the CRP and SAP and shall reflect that no employer reversion of CRP or SAP assets is possible, and that, in the event of plan termination, all assets of the CRP and SAP shall be allocated to participants and beneficiaries in accordance with this Judgment. Chevron

Corporation shall submit the approved amendments to the IRS and PBGC for approval when it submits the information pursuant to paragraph (e) below;

(d) Section 18.d of the Chevron Retirement Plan is void ab initio and shall be treated as such to the extent that it purports to allow a reversion of CRP and SAP assets to Chevron Corporation;

(e) The CRP and SAP shall be terminated and the assets in their separate trusts distributed as soon as reasonably practicable following the spin-offs of the plans. Chevron Corporation will take all ministerial steps necessary to accomplish such termination, including advance notification of participants, the IRS and the PBGC. Chevron Corporation may choose the exact date of termination, but that date shall be no later than six months after the date of this Judgment;

(f) Class members eligible to share in the allocation of surplus assets ("distributees") shall include all members of the main class defined by the Court who were members or beneficiaries of the CRP or SAP;

(g) Allocation of assets among distributees shall be done in accordance with the procedure outlined in the draft of Appendix A to this Judgment;

(h) Distributees may elect to receive their allocable share of plan assets in any of the forms otherwise available pursuant to the Chevron Retirement Plan, subject to any applicable requirements of a spousal consent or qualified domestic relations order;

(i) Any benefits payable in an annuity form shall be provided through annuities purchased from one or more insurance companies selected pursuant to the procedure in Appendix A;

(j) Allocation of assets shall be subject to the approval of Mr. Dreher;

(k) The termination of the CRP and SAP and their trusts and the distribution of their assets shall be submitted to the IRS and PBGC under joint supervision of counsel for plaintiffs and counsel for defendants;

(l) After the spin-off and termination of the CRP and SAP, no further CRP or SAP benefit accruals will be payable from the Chevron Retirement Plan. The Chevron Retirement Plan may be amended to delete the contributory allowance in its entirety and CRP and SAP annuitants will not be eligible for voluntary AVIS supplements, which may be granted to the other Chevron Retirement Plan beneficiaries. Future salary increases of active CRP and SAP plan participants after the termination of the CRP and SAP will no longer affect the value of CRP or SAP benefit accruals;

(m) Defendants will designate class counsel as persons having power of attorney in connection with matters involving the IRS and PBGC, and will designate them to receive copies of any communications with or by the agencies on any matter concerning the spin-off, termination and distribution of assets of the CRP and SAP. The Court shall retain jurisdiction to resolve any objections raised by the PBGC or IRS that cannot be resolved by agreement among the parties;

(n) Each party will pay its own expenses in connection with the spin-off and termination of the CRP and SAP. Expenses of Mr. Dreher incurred pursuant to this Judgment will be paid from CRP and SAP assets;

(o) The parties will meet within 5 business days from the entry of this Judgment to agree upon the timing and any proposed modifications of Appendix A. If the parties agree, they will forward an executed copy of the final version of Appendix A to the Court by April 25, 1991, for approval. If the parties cannot agree on the timing or details of these procedures, (1) the Court will conduct a hearing on May 2, 1991, at 2:00 p.m., and (2) no later than April 25, 1991, each side will provide the Court with its proposed version of Appendix A, together with an explanation of why its proposal is more reasonable than that of its opponents.

4. The Court will maintain jurisdiction over this action to ensure compliance with the relief ordered in paragraph 3 of this Judgment and to determine whether plaintiffs' counsel are entitled to additional attorneys' fees and expenses, and if so, the reasonable and necessary amount of such fees and expenditures.

This is a FINAL JUDGMENT.

APPENDIX A

PROCEDURE FOR UNMERGING CRP AND SAP FROM CHEVRON RETIREMENT PLAN, TERMINATING THE CRP AND DISTRIBUTING ASSETS TO PLAN MEMBERS AND BENEFICIARIES

I. ESTABLISH CURRENT MARKET VALUE OF CRP AND SAP ASSETS BY _____.

A. Obtain records from last Chevron/Bankers Trust accounting.

B. Obtain any updates from Chevron/Bankers Trust.

C. Actuaries to review Chevron/Bankers Trust records and make any corrections or changes necessary.

D. Conduct audit to review income and pay-outs from trust funds, and establish market value of CRP and SAP trust assets as of date of Final Judgment.

II. ESTABLISH SEPARATE TRUST ACCOUNTS BY _____.

A. Within ____ days of the Final Judgment, actuaries to provide Chevron with certification of compliance with IRC § 401(a)(12), and regulations under § 414(1), required by Form 5310.

B. Within ____ days of the Final Judgment Chevron to file Form 5310 with IRS for Chevron Retirement Plan, CRP and SAP.

C. Plaintiffs to draft separate trust instruments and submit to defendants for comments.

D. Plaintiffs to submit names of trustee(s) of separate CRP and SAP trusts to defendants for comments and input.

E. Court approval of trust instruments and trustee(s).

F. Transfer cash from Chevron Master Trust to separate CRP and SAP trusts.

G. Invest cash in short-term, high-quality liquid assets.

III. TERMINATION OF CRP AND SAP UNDER § 4041 OF ERISA AND IRS APPROVAL.

A. Chevron to notify CRP and SAP participants and beneficiaries 60 days before termination date.

1. Notice to each participant to contain information required by ERISA § 4041(b)(2)(B) (amount of benefit, form of benefit, basis for calculating benefit, etc.).

B. Chevron to file PBGC Form 500 (Notice of Intent to Terminate) as soon as practicable after giving notice.

1. Actuaries to provide Chevron with PBGC Schedule EA-S.

C. Chevron to file Form 5310 seeking IRS approval of termination at same time as filing Form 500.

D. Chevron will choose the date of termination, but the date will be no later than six months after the entry of Final Judgment, and no earlier than 60 days after Chevron notifies participants of intent to terminate.

IV. ACTUARIAL VALUATION OF CRP AND SAP PLAN LIABILITIES ON TERMINATION BASIS AS OF TERMINATION DATE BY _____.

A. Mr. Dreher will obtain all relevant information concerning participants and beneficiaries (age, sex, salary, service dates, employee numbers, benefit amounts, etc.) from defendants and/or Chevron's actuaries.

B. Mr. Dreher will submit proposed assumptions to parties for comments and approval.

C. Mr. Dreher will confirm benefit entitlement of each CRP and SAP participant and beneficiary (using data from defendants and Chevron's actuaries, benefit calculation worksheets, etc.).

D. Mr. Dreher will calculate plan liabilities on termination basis as of date of termination.

E. Mr. Dreher will submit to the parties for comments and to the Court for approval, if necessary, a report showing termination basis liabilities, value of trust assets and amount of surplus.

V. ALLOCATION OF SURPLUS.

A. Allocate surplus among all members of the class who were members in or beneficiaries of the CRP and SAP, including all former participants whose pension benefits were transferred to the pension plan established by Sohio or Cumberland Farms in connection with those divestitures.

B. Specific methods of allocating surplus to various groups.

1. Generally, the fraction of the surplus to be allocated and distributed to each of the participants and beneficiaries shall be calculated by dividing the single sum value of the CRP or SAP accrued benefit ("share basis") of each class member by the single sum value of all such accrued benefits.

2. "Share basis" for former participants whose benefits were transferred to either Sohio or Cumberland Farms pension plans, or who left the Gulf Plan prior to date of termination of the CRP or SAP, shall be based upon their accrued benefits as of the date of their termination of employment from Gulf or Chevron.

3. For all participants who were active employees as of June 30, 1986, and remain active on CRP or SAP termination date, the share basis will be based upon their accrued benefit as of the date of CRP/SAP termination.

VI. DISTRIBUTE BENEFITS AND SURPLUS BY _____.

A. Plaintiffs' counsel will notify participants and beneficiaries of approximate amounts due them and their payment options.

1. Annuities.
   a. Period certain.

   b. Joint and survivor.

c. Combinations of the above.

2. Lump sum for those who were active on or after July 1, 1986.

B. Plaintiffs' counsel will tabulate responses from participants and beneficiaries.

C. Plaintiffs' counsel or trustee(s) will appoint consultant for annuities and develop bid specifications.

D. Plaintiffs' counsel or trustee(s) will invites bids from financially strong insurance and annuity companies.

E. Consultant will evaluate bids and recommend winning bidder(s), subject to Court approval.

F. Plaintiffs' counsel, Mr. Dreher and trustee(s) will prepare final list of benefit and surplus amounts for each participant or beneficiary.

G. Submit distribution plan to Court for final approval.

H. Transfer assets to annuity underwriters (reserving some funds for administrative expenses).

I. Mr. Dreher will confirm calculations of annuity underwriters.

J. Distribute lump-sum amounts.

K. Plaintiffs' counsel to review and finalize annuity contracts.

L. Distribute annuity certificates to participants and beneficiaries.

M. Distribute IRS 1099 forms.

N. Mr. Dreher will inform Chevron of CRP and SAP benefits.

O. Chevron may not offset any surplus amounts received by participants from non-contributory benefits otherwise due under Chevron Retirement Plan.

VII. PREPARE FINAL REPORT OF ASSET DISTRIBUTION FOR COURT (JOINT EFFORT BY COUNSEL, TRUSTEE(S), ACTUARIES AND ANY CONSULTANTS) BY _____.

APPENDIX D

Cause No. H-86-4365 (consolidated w/H-87-2064)

Style: BORST, et al. v. CHEVRON, et al.

Appearances:

Counsel:	Representing:
John Malinak	Defendants
John Neslage	Defendants
Autry Ross	Defendants
Lee Godfrey	Plaintiffs
Charles Plenge	Plaintiffs
Ellen Doyle	Plaintiffs
Jo Wilson	Plaintiffs

Date: January 4, 1990 Reporter: J. Simon
Law Clerk: G. Hanks

Time: 1:00 pm/5:00 pm

HEARING
MINUTES AND ORDER

At the conclusion of the evidence the following rulings were made:

Defendants' motion to dismiss plaintiffs' state law claims (#138) is GRANTED for reasons stated in open court on the record.

Defendants' motion to strike jury demand (#129) is GRANTED for reasons stated in open court on the record.

Plaintiffs' motion to compel production of documents (#171) is GRANTED in a separate order.

Court CERTIFIED subclass under Rule 23(b)(2) as defined on the record for reasons stated in open court.

Counsel are to submit an agreed order or separate orders re class notification and proposed form of notice by January 22, 1990, pursuant to instructions made in open court.

Hearing on form of class certification order and notices and trial schedule will be held on January 26, 1990, at 9:00 a.m.

The Clerk will file these Minutes and Order and provide copies to the parties.

/s/

Sim Lake
United States District Judge